TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 99.

D. C. FRITZLEN, EDNA P. FRITZLEN, AND W. H. WELDON, PLAINTIFFS IN ERROR,

vs.

THE BOATMEN'S BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED MAY 31, 1907.

(20,748.)

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0 In the Supreme Court of the State of Kansas.

Be it remembered that on the 27th day of March, A. D. 1906, there was filed in the office of the clerk of the supreme court of the state of Kansas a petition in error cross petition in error and case made from the district court of Clark county which petition in error, cross petition in error and so much of the case made and record attached thereto as was considered by this court in the determination of this proceeding in error, are in words and figures as follows:—to-wit:—

1 In the Supreme Court of Kansas.

No. ——.

BOATMEN'S BANK, Plaintiff in Error,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and W. H. WELDON,
Defendants in Error.

Petition in Error.

Said Boatmen's Bank, plaintiff in error herein, shows to the Court and states, that on the 23rd day of July, 1903 said W. H. Weldon as plaintiff commenced a suit in the District Court of Clark County, Kansas, against said D. G. Fritzlen, Edna P. Fritzlen and said Boatmen's Bank as defendants in said action, and that on the 2nd day of October, 1905, said cause was finally disposed of by the final judgment and decree of said District Court of Clark County, Kansas, in favor of said plaintiff, W. H. Weldon and said defendants D. G. Fritzlen and Edna P. Fritzlen against said Boatmen's Bank.

And said Boatmen's Bank, plaintiff in error aforesaid, further states, that the amount in controversy in said cause in said District Court and now in controversy in this court, exceeds, exclusive of interest and costs, the sum and value of Seven Thousand Dollars ($7,000), and that an original case made embodying all of the record and proceedings had upon the several trials of said action and had in said cause in which said final decree and judgment were rendered as aforesaid, and including all of the record of said cause duly prepared, served, settled, allowed and signed by the Judge of said District Court who tried said cause and rendered said final judgment and decree, is hereto attached and made a part of this petition in error.

2 Said plaintiff in error, the said Boatmen's Bank, alleges that there were material errors committed by the said District Court of Clark County, Kansas, in the disposition of said action and in the several trials therein, and in the rendering of its decisions, orders and of said final judgment and decree hereinbefore

mentioned, which said material errors are apparent upon the face of such record and case made, and are as follows, to-wit:

I.

Said District Court of Clark County, Kansas erred by its order of date June 18, 1904, and which order was filed in said cause July 2, 1904, in refusing to grant and in denying the petition of said Boatmen's Bank filed in said cause June 20, 1904 and praying, for the reason and on the grounds set forth in said petition, for the removal of said cause to the United States Circuit Court for the District of Kansas, Second Division.

II.

Said District Court of Clark County, Kansas erred by its order dated June 18, 1904 and filed in said cause November 15, 1904, in overruling the demurrer of said Boatmen's Bank to paragraph 2, being the first cause of action set forth in the separate answer in said cause of defendant D. G. Fritzlen.

III.

Said District Court erred by its said order dated June 18, 1904, filed in said cause November 15, 1904, in overruling the demurrer of said Boatmen's Bank to the third and last paragraph of the reply in said cause of action of plaintiff W. H. Weldon to the answer of said defendant Boatmen's Bank.

3

IV.

Said District Court erred by its said order dated June 18, 1904 and filed in said cause November 15, 1904, in overruling and denying the motion of said Boatmen's Bank to strike out the fourth paragraph of the separate answer in said cause of defendant D. G. Fritzlen.

V.

Said District Court erred by its said order dated June 18, 1904 and filed in said cause November 15, 1904, in overruling and denying the motion of said Boatmen's Bank to strike out the fifth paragraph of the separate answer of said defendant D. G. Fritzlen.

VI.

Said District Court erred in and by its order dated November 15, 1904 and filed November 15, 1904, overruling and denying the motion of said Boatmen's Bank filed in said cause September 14, 1904, to strike out certain *prats* of paragraph 4 of the said separate answer of defendant D. G. Fritzlen in said cause.

VII.

Said District Court erred by its order filed in said cause April 20, 1905, in and by which order said Court overruled and denied the

motion of said Boatmen's Bank filed in said cause April 20, 1905, for the removal of said cause to the United States Circuit Court for the District of Kansas, Second Division.

VIII.

Said District Court erred by its order dated May 1, 1905, and filed in said cause May 2, 1905, in and by which order said District Court refused leave to said Boatmen's Bank to file an amended replication to the fourth paragraph of said separate answer of said D. G. Fritzlen, setting up the statute of frauds.

4

IX.

Said District Court, in and by its said order dated May 1, 1905 and filed in said cause May 2, 1905, erred in making its said order on the application of defendant D. G. Fritzlen, ordering the trial of this cause on the issues between him and the said Boatmen's Bank on the fourth paragraph of said answer, be submitted to a jury and that there also be submitted to said jury the question of the value of said property taken by said Bank in October, 1903, as such issue was and is so made by the fifth paragraph of said separate answer of said D. G. Fritzlen.

X.

Said District Court erred at the beginning of the jury trial on May 1, 1905, in overruling the objections and exceptions of the said Boatmen's Bank to the trial of this cause in said District Court, on the ground that said District Court was without jurisdiction to try the same and for the reason that said cause was pending in the United States Circuit Court for the District of Kansas, Second Division, on both of the petitions for removal in this cause.

XI.

Said District Court erred in and by its order made May 1, 1905 in said cause, at the evening session thereof, beginning at 7:30 P. M., in ordering that there be submitted to the jury in the trial, said three questions:

1. The question of the amount due from D. G. Fritzlen to plaintiff Weldon.

2. As to whether or not there was a contract, as pleaded, for the furnishing of feed, and if so, whether or not there was a breach of it, and if a breach of the contract, then the amount of the damages; and,

3. Submitting to the jury for the purpose of having the matter determined by them for the future guidance of the court,

5 the question of the value of the property mentioned in the fifth paragraph of the separate answer of said D. G. Fritzlen.

XII.

Said District Court erred on the jury trial of said cause in overruling the objection of said Boatmen's Bank to the reception of any

evidence as to the value of the property alleged to have been taken in October, 1903, for the reason that question was one of the questions that would have to be determined in the replevin action of said Boatmen's Bank pending in the United States Circuit Court for the District of Kansas, Second Division, and that the question of the value of said cattle was one of the necessary questions in said replevin action.

XIII.

Said District Court erred during the jury trial in said cause, in admitting in evidence over the objection of said Boatmen's Bank, evidence offered by said D. G. Fritzlen to prove how other cattle in the neighborhood of said defendant D. G. Fritzlen's cattle survived the snow storm of February, 1903.

XIV.

Said District Court erred in the jury trial of said cause in sustaining the objection of defendant D. G. Fritzlen to the question on cross examination by said Boatmen's Bank, of the witness William S. Fritzlen as to whether, in the opinion of said William S. Fritzlen, as a cattle man, if the snow storm of February, 1903, had not come along and if there had been the same storms the winter of 1902-1903 as the preceding winter, cattle of defendant D. G. Fritzlen on his range would have gone through the winter all right.

6 XV.

Said District Court on the jury trial of said cause erred in the admission, over the objection of said Boatmen's Bank, of certain portions of the deposition of John Simmons.

XVI.

Said District Court erred on the jury trial in said cause in denying to said defendant Boatmen's Bank the right to prove on the cross-examination of the witness W. H. Weldon, who was a witness for the defendant D. G. Fritzlen, that said W. H. Weldon was the plaintiff in this case.

XVII.

Said District Court erred at the jury trial of said cause, at the conclusion of the evidence offered by the defendant D. G. Fritzlen in support of his separate answer in said cause, in refusing to sustain and in overruling the demurrer of said Boatmen's Bank to the evidence introduced by said defendant D. G. Fritzlen under the fourth and fifth paragraphs of said separate answer of said D. G. Fritzlen, and in refusing and overruling each of said demurrers to said fourth and fifth paragraphs separately.

XVIII.

Said District Court at the jury trial, erred in rejecting and in refusing to admit in evidence the certified transcript of the record

in the United States Circuit Court for the District of Kansas, Second Division, in the replevin action of the Boatmen's Bank against said defendants D. G. Fritzlen, Edna P. Fritzlen and W. H. Weldon.

XIX.

Said District Court on the jury trial of said cause, erred in excluding from evidence and not admitting in evidence a certified copy of the writ of error, citation, service and bond given on the writ of error in the replevin action in said Circuit Court and
7 certified to by John D. Jordan, Clerk of the United States Court of Appeals for the Eighth Circuit.

XX.

Said District Court erred on the trial of said cause in rejecting and not admitting in evidence a certified copy of the opinion of the United States Circuit Court of Appeals for the Eighth Circuit, given on March 4, 1905, in said replevin action.

XXI.

Said District Court at the jury trial in said cause erred in refusing the instruction asked by said Boatmen's Bank to the jury, that the oil cake in question having been delivered to the railroad company for shipment to said D. G. Fritzlen at Kingsdown, Kansas, and the bill of lading therefor having been mailed to and received by said Fritzlen about February 6, 1903, the delay in transit of the oil cake thereafter was at his risk and not the risk of said Bank, and the verdict of the jury on the fourth paragraph of his answer, should be against him and for said Bank.

XXII.

Said District Court erred on the jury trial in said cause, in refusing to instruct the jury that the snow storm in question was the proximate cause of the damages and loss of defendant D. G. Fritzlen, and that the verdict of the jury on the said fourth paragraph of the answer of said D. G. Fritzlen should be against him and in favor of said Bank.

XXIII.

Said District Court on the jury trial in said cause erred in refusing the prayer of said Boatmen's Bank for a peremptory instruction to said jury to find and return a verdict for said Boatmen's Bank, finding the issues in its favor on the said fourth paragraph of said answer of said D. G. Fritzlen in said cause.

8 XXIV.

Said District Court at said Jury trial in said cause erred in refusing to instruct the jury to return a verdict for said Boatmen's Bank on the fifth paragraph of the answer of said D. G. Fritzlen.

XXV.

Said District Court on said jury trial erred in giving, in part, to the jury instruction No. 1 asked for by said defendant D. G. Fritzlen.

XXVI.

Said District Court on said jury trial erred in giving to the jury instructions in division two of its charge to the jury numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14 and 15, and in giving each one of said instructions numbered from 2 to 15 and in giving each paragraph in each of said instructions. Each of said instructions from 2 to 15 is erroneous, and said instructions from 2 to 15 are erroneous as a whole.

XXVII.

Said District Court, at the beginning of the trial by the court of the court issues in said cause which was begun May 6, 1905, erred in overruling the objection of said Boatmen's Bank that said District Court was without jurisdiction in said cause, on the ground that this cause had been removed to the United States Court for the District of Kansas, Second Division.

XXVIII.

Said District Court, at the beginning of said trial by the court, on said May 6, 1905, erred in overruling the objection of said Boatmen's Bank to the reception of any evidence, on the ground that neither the third paragraph of plaintiff's reply or the second paragraph of the separate answer of defendant D. G. Fritzlen herein state sufficient facts to entitle either the plaintiff or D. G. Fritzlen to any relief or judgment against said Bank.

9 XXIX.

Said Circuit Court, at the conclusion of the evidence offered and admitted on said trial by the court, erred in overruling and denying the request of the said Boatmen's Bank to the court, to declare that upon the undisputed facts shown by all the evidence offered at said trial by the court the law is with said Bank, and as a conclusion of law from said facts that the court finds said issues in favor of said Bank and against said other parties.

XXX.

Said District Court, on the trial by the court of the issues submitted to the court in said cause, erred on the conclusion of the opening statement of Mr. Hite, one of the attorneys of defendant D. G. Fritzlen in not sustaining the demurrer of the defendant Boatmen's Bank to said statement of facts as insufficient to warrant any relief against said bank, either in favor of plaintiff Weldon or defendant Fritzlen; and the District Court erred in not giving judgment and decree on said state of facts, in favor of defendant Bank and against defendant Fritzlen on that statement.

-XXI.

Said District Court on September 8, 1905, in and by its order dated that day, filed in said cause September 12, 1905, erred in sustaining the objections of plaintiff and said defendant D. G. Fritzlen to the request of said Boatmen's Bank to withdraw its motion in said cause for an accounting; and said court also erred in and by said order in announcing that it would proceed to take an accounting in said cause between the defendant D. G. Fritzlen and the defendant Boatmen's Bank, for the purpose of ascertaining the amount of the Bank's lien upon the property described in its mortgages.

10 XXXII.

Said District Court erred in overruling the objection of said Boatmen's Bank that said accounting was not warranted by the pleadings of the parties in said cause.

XXXIII.

Said District Court erred in the conclusions of law and in each of them, stated and found by the court on the findings of fact made by the court and contained in its journal entry dated October 2, 1905 and filed October 2, 1905.

XXXIV.

Said District Court erred in overruling the motion of said Boatmen's Bank to set aside the verdict of the jury and for a new trial, which motion for a new trial was filed by said Boatmen's Bank on May 6, 1905.

XXXV.

Said District Court erred in overruling the motion for a new trial, filed by said Boatmen's Bank August 9, 1905, which motion for a new trial was filed to set aside and for a new trial of the issues submitted to the court on the trial by the court, and the findings of which issues were orally announced on said August 9, 1905.

XXXVI.

Said District Court erred in overruling and denying the motion for a new trial of said Boatmen's Bank, filed in said cause October 2, 1905.

XXXVII.

Said District Court erred in overruling the motion in arrest of judgment filed by said Boatmen's Bank in said cause, which motion and overruling of the same took place on October 2, 1905.

11 XXXVIII.

Said District Court erred in giving judgment in said cause for *for* $41,000 on the verdict of the jury in said cause in favor of said defendant D. G. Fritzlen against said defendant Boatmen's Bank.

XXXIX.

The final judgment and decree in this cause given and entered by the District Court of Clark County, Kansas, October 2, 1905 and filed on that day, was and is erroneous in each and all of its parts and as a whole. The finding of facts in said cause is not supported by the evidence and the conclusions of law stated and announced therein by the Judge of said Court and by said Court were and are erroneous.

XL.

Said District Court erred in overruling the motion in arrest of judgment filed by said Boatmen's Bank.

XLI.

Said proceedings in said cause and the final decree and judgment therein, and the orders, proceedings and judgments of said court therein, were each and all violative of the rights of said Boatmen's Bank under the constitution and laws of the United States.

XLII.

This suit, from begining to end, was and is a fraudulent action instituted and maintained in violatiop of the rights of said Boatmen's Bank, under the constitution and laws of the United States.

XLIII.

The orders, proceedings and decrees in this cause in said District Court were and are a denial of said Boatmen's Bank of the equal protection of the laws, and have been maintained without due process of law, in violation of Article XIV of the Amendments to the Constitution of the United States.

12 Said Boatmen's Bank, plaintiff in error herein, files herewith a waiver of summons in error by the attorneys of record of said W. H. Weldon and said D. G. Fritzlen and Edna P. Fritzlen, and said Boatmen's Bank also files herewith a copy of the case made appended hereto, and also a duly certified transcript of the record in this cause, certified by the Clerk of the District Court of Clark County, Kansas.

Wherefore, the premises considered, said Boatman's Bank, plaintiff in error herein, prays the Court on the hearing of this cause to reverse, annul and hold to be void each and all of the proceedings, orders, judgments, decrees and other matters hereinbefore complained of.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Plaintiff in Error.

13 In the Supreme Court of Kansas.

BOATMENS BANK, Plaintiff in Error,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and W. H. WELDON,
Defendants in Error.

Cross Petition in Error of W. H. Weldon, a Defendant in Error.

Now comes, W. H. Weldon, one of the above named defendants in error and for his cross petition in error in the above entitled cause says:

I.

That heretofore, to-wit on October 2nd, 1905 in an action then pending in the District Court of Clark County, Kansas, wherein this defendant in error was plaintiff, and the Boatmens Bank, D. G. Fritzlen and Edna P. Fritzlen above named were defendants, said district court rendered a judgment against this defendant in error whereby the said District Court adjudged and decreed that the plaintiff in error herein held a valid first lien upon certain real and personal property described in two certain mortgages set out in the answer of said Boatmens Bank in said cause and that the mortgage lien of this defendant in error was junior and inferior to the mortgages and liens of the said plaintiff in error. That a true and correct transcript of the proceedings of said District Court in said action and of the judgment aforesaid is set out and referred to as an exhibit to the petition in error of the plaintiff in error herein. This defendant in error as cross petitioner in error takes leave to refer to the case made attached to the petition in error of the said Boatmens Bank and makes the same a part of this cross petition in error.

II.

This defendant in error and cross petitioner in error avers that there is manifest error in the proceedings and judgment of the said district court in said cause which errors are more particularly shown in said case made and for his assignments of error this defendant in error says:

14 (*a*) The judgment and decree of the said District court is not sustained by the findings of fact made by said court and is contrary to law.

(*b*) The said court erred in rendering judgment that the plaintiff in error had a paramount and superior lien to that of this defendant in error when upon the findings of fact made by the court its judgment should have been that the pretended note and mortgages of the said plaintiff in error were wholly void.

(*c*) The said learned trial court erred in rendering a judgment in favor of the said Boatmens Bank for the amount which said trial court found to be due on the note set out in the answer of the said

bank, said amount so found by the court to be due being erroneously stated at a sum greater than is sustained by the findings of fact made by the court.

All of the foregoing errors committed by said learned trial court are manifest upon the face of the record of the findings and judgment of said court.

Wherefore this defendant in error as cross petitioner humbly prays this honorable court that said judgment of the District Court of Clark County, Kansas be reversed and that this court hear in this cause render its judgment directing the said District Court of Clark county, Kansas to enter a judgment in the said action on the said findings of fact that the lien of this defendant in error is superior and paramount to the pretended lien and mortgages of the said Boatmens Bank plaintiff in error herein, and for such other relief as to this court may seem lawful.

FRANCIS C. PRICE,
Attorney for W. H. Weldon.

15 In the Supreme Court of the State of Kansas.

BOATEMEN'S BANK, Plaintiff in Error,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and W. H. WELDON,
Defendants in Error.

Cross Petition in Error of D. G. Fritzlen, a Defendant in Error.

And now comes D. G. Fritzlen, one of the defendants in error, and presents this his cross petition in error in the above entitled cause, and thereupon said Cross Petitioner says:

I.

That heretofore on October 2, 1905 in an action then pending in the District Court of Clark County, Kansas wherein W. H. Weldon was plaintiff and the Boatmen's Bank one of the defendants in error and this defendant in error and his wife Edna P. Fritzlen were defendants, said District Court rendered a judgment against this defendant in error whereby the said District Court determined and adjudged that a certain note and two mortgages securing the same, then as now held by the said Boatmen's Bank were valid and that said two mortgages constituted val-d and enforceable liens on and against certain real estate and personal property of this defendant in error which property is more particularly described in said mortgages. That a true and correct transcript of the proceedings of the said District Court in said action and of the judgment aforesaid is set out in the case-made presented to this court by the said Boatmen's Bank plaintiff in error herein, as exhibit "A" attached to said plaintiff in error's petition in error herein.

II.

This defendant in error and Cross Petitioner alleges that there is manif-st error in said proceedings and judgment of the said District Court as follows, to-wit:

16 1. The conclusion of law made by the said District Court and shown by the said case-made, to the effect that said note and mortgages were valid obligations of this defendant in error and that said mortgages were not wholly void, but constituted valid and subsisting liens against the said property of this defendant in error is not sustained by the findings of fact amade by the said District Court in said action and shown in said case-made. The said error of law committed by the said District Court is manifest on the face of the record of its said proceedings in said action.

2. The judgment of the said trial court that the said plaintiff in error has any subsisting lien upon any of the property of this defendant in error is not sustained by the findings of fact made by the court. The said error in said judgment is manifest on the face of the said record.

2. The said District Court erred in failing to render a decree that the note and mortgages securing the same held by the said Bank were wholly void.

Wherefore this defendant in error as a cross petitioner prays that said judgment of the said District Court be reversed by this court and for such other relief as to the court may seem in accordance with law.

H. J. BONE,
D. R. HITE,
Attorneys for D. F. Fritzlen.

[Endorsed:] Boatmens Bank *vs.* D. G. Fritzlen *et al.* Copy Cross Petition in Error of D. G. Fritzlen.

17 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, BOATMEN'S BANK, Defendants.

Petition.

The plaintiff for his cause of action against the defendants says:

I.

That on July 2nd, 1903, the defendants D. G. and Edna P. Fritzlen for a valuable consideration executed to this plaintiff their promissory note for the sum of Thirty seven hundred and fifty Dollars ($3750.00). Which said note by its terms became due and payable to this plaintiff on July 12th, 1903, That a copy of said note is hereto attached marked exhibit "A" and made a part of this petition. That said note is due and unpaid and there is due to this plaintiff on account thereof from said defendants D. G. and Edna P. Fritzlen the sum of Thirty seven hundred & fifty Dollars ($3750.00).

II.

That on July 2, 1903, the defendants D. G. and Edna P. Fritzlen for the purpose of securing the payment at maturity of the note mentioned in paragraph 1 of this petition executed to this plaintiff certain mortgages by the terms of which the said defendants D. G. and Edna P. Fritzlen conveyed to this plaintiff as security for the debt evidenced by said promissory note referred to hereinbefore as exhibit "A" the following described personal and real property to-wit:

18 366 cows with about 200 calves
252 two-year-old steers
186 two-year-old heifers
317 yearling steers and heifers
27 bulls
Aggregating 1148 head of cattle.
75 mares and colts
40 geldings, unbroken, three to five years old
40 yearlings (geldings and fillies)
30 saddle horses (4 to 12 years old.)
4 work horses
4 mares (unbranded—Missouri)
4 fillies (unbranded—Missouri)
2 geldings (unbranded—Missouri)
Aggregating 199 head of horese-.

The real estate mortgaged to this plaintiff by the said defendants D. G. and Edna P. Fritzlen is described and situated as follows:

N. E. ¼ N. E. ¼ sec.	33	Twp. 30	Rg. 22	W. ½ N. W. ¼	34	30	22
S. E. ¼ S. W. ¼	6	30	22	Lot 2	7	30	22
E. ½ N. W. ¼	7	31	22	N. W. ¼	7	31	22
N. E. ¼	12	31	23	N. E. ¼ S. E. ¼	12	31	23
N. W. ¼	12	31	23	S. E. ¼ S. E. ¼	1	31	23
S. ½ S. W. ¼	1	31	23	S. E. ¼ S. E. ¼	2	31	23
N. E. ¼ N. E. ¼	11	31	23	S. E. ¼	4	31	23
N. W. ¼	10	31	23	N. E. ¼	9	31	23
S. W. ¼	9	31	23	S. E. ¼	9	31	23
Lots 1 & 3 in	1	30	23	S. E. ¼ N. E ¼	1	30	23
E. ½ S. E. ¼	1	30	23	E. ½ S. E. ¼	11	30	23
S. W. ¼ S. E. ¼	11	30	23	S. E. ¼ N. E. ¼	11	30	23
S. ½ N. W. ¼	13	30	23	N ½ S. W. ¼	13	30	23
All of sec.	14	30	23	S. ½ N. E. ¼	24	30	23
N. ½ S. E. ¼	24	30	23	S. W. ¼ S. E ¼	24	30	23
S. E. ¼ S. W. ¼	24	30	23	E. ½ N. W. ¼	25	30	23
W. ½ N. E. ¼	21	30	23	N. E. ¼ N. W. ¼	21	30	23
N. W. ¼ S. E. ¼	21	30	23	N. ½ N. E. ¼	22	30	23
N. ½ N. W. ¼	22	30	23	S. W. ¼ N. W. ¼	11	30	23
N. ½ S. W. ¼	11	30	23	N. W. ¼ S. E. ¼	11	30	23
N. E. ¼ N. E. ¼	21	30	23	S. E. ¼ N. W. ¼	22	30	23
S. W. ¼ S. W. ¼	21	30	23	E. ½ N. E. ¼	28	30	23
N. ½ S. E. ¼	28	30	23	S. W. ¼ N. E. ¼	27	30	23
W. ½ S. W. ¼	27	30	23	S. ½ N. W. ¼	35	30	23
N. ½ S. W. ¼	35	30	23	S. ½ S. W. ¼	35	30	23
S. E. ¼	35	30	23	N. E. ¼	35	30	23
W. ½ N. E. ¼	3	31	23	S. E. ¼ N. E. ¼	3	31	23
N. E. ¼ S. E. ¼	3	31	23	S. ½ S. E. ¼	3	31	23
S. E. ¼ S. W. ¼	3	31	23	S. W. ¼ S. W. ¼	2	31	23
N. ½ N. W. ¼	11	31	23	N. W. ¼ N. E. ¼	11	31	23
S. W. ¼ N. E. ¼	11	31	23	N. W. ¼ S. E. ¼	11	31	23
E. ½ S. W. ¼	11	31	23	W. ½ N. W. ¼	23	30	23
W. ½ S. W. ¼	23	30	23				

That all of said real estate is situated in Clark County, Kansas.

19 That a copy of said mortgages conveying to this plaintiff said personal property and said real property is hereto attached and marked respectively exhibits "B" and "C" and made a part of this petition.

III.

That the defendant the Boatmen's Bank is a corporation organized and existing under the laws of the State of Missouri, and has its principal office in the city of St. Louis, in said State. That said defendant bank has or claims to have an interest in the personal and real property hereinbefore described by virtue of certain pretended mortgages which said bank asserts to be liens upon said personal and real property but this plaintiff alleges that the Boatmen's Bank defendant herein has no right title or interest in or to any of said personal or real property; and that whatever interest the said Boatmen's Bank has or claims to have by virtue of said mortgages grows out of certain transactions entered into between said bank and a certain partnership known as Elmore & Cooper which said transactions insofar as they relate to said mortgage liens this plaintiff alleges to be wholly illegal and void. This plaintiff further alleges that the mortgages which the said Boatmen's Bank asserts are void, illegal, and of no effect. The plaintiff further alleges that if said Boatmen's Bank has any claim or right, title or interest, in or to any of said personal or real property the same is junior, inferior, and subordinate to the right title, interest and lien of this plaintiff.

That by virtue of said mortgages executed to this plaintiff by the said defendants D. G. and Edna P. Fritzlen this plaintiff is now the owner and holder of valid and subsisting liens against said personal and real property hereinbefore described to the amount of Thirty seven hundred & fifty Dollars ($3750.00). That the said Boatmen's Bank defendant herein, claiming, as it does, the legal title to said personal property by virtue of said pretended, illegal and void mortgages, is about to take possession of said personal property and convert the same to its own use to the irreparable injury of this plaintiff, as said bank will convey said personal property out of the jurisdiction of this court.

20 Wherefore this plaintiff prays for judgment against the defendants D. G. and Edna P. Fritzlen for the sum of Thirty seven hundred & Fifty Dollars ($3750.00), with interest thereon at the rate of ten per cent. per annum from July 2" 1903 and that said judgment may be declared to be a lien upon all the said personal and real property hereinbefore described; that upon final decree that said personal and real property, or so much thereof as may be necessary, shall be sold for the purpose of satisfying said judgment; that the mortgage lien of this plaintiff against said personal and real property be decreed to be a first lien thereon; that upon the sale of said property that the proceeds thereof be brought into court and applied as follows:

First to the payment of the costs of this suit.

Second to the payment of the costs of said sale.

Third to the satisfaction of this plaintiff's claim and judgment against said D. G. and Edna P. Fritzlen.

The plaintiff further prays that the pretended claim, lien, and interest of the said defendant the Boatmen's Bank be declared to be illegal and void.

The plaintiff further prays for such other and further relief as to this court may seem meet and the plaintiff will ever pray.

F. C. PRICE,
Attorney for Plaintiff.

Precipe.

The clerk of this court will please issue a summons for the defendants D. G. and Edna P. Fritzlen, direct the same to the sheriff of Clark County Kansas, and make it returnable according to law. The clerk will please endorse on said summons that it is in an action for the recovery of money and other relief and that the amount claimed is Thirty — hundred & fifty Dollars ($3750.00), with interest.

F. C. PRICE,
Attorney for Plaintiff.

EXHIBIT "A."

ASHLAND, KS., *July* 2", 1903.

$3750.00.

Ten days after date we promise to pay to the order of W. H. Weldon Thirty seven hundred and fifty Dollars at The Stockgrowers National Bank, Ashland, Kansas, value received, with interest at ten per cent., per annum after date until paid.

D. G. FRITZLEN.
EDNA P. FRITZLEN.

Filed July 23, 1903.
A. BAKER,
Clerk Dist. Court,
By B. C. BAKER, *Deputy.*

21 In the District Court, Clark County, State of Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, BOATMEN'S BANK, Defendants.

Affidavit for Publication Service.

Francis C. Price being duly sworn on his oath says that he is the Attorney of the above named plaintiff in the above entitled cause, and that on the 23rd day of July, 1903, said plaintiff filed in the above named court, a petition against the defendants, D. G. Fritzlen, Edna P. Fritzlen, and Boatmen's Bank, a corporation of St. Louis Mo. This affiant further swears that said action was brought to

foreclose a certain real estate mortgage and a certain chattel mortgage, given by defendants, D. G. Fritzlen and Edna P. Fritzlen on July 18th, 1903, to the plaintiff W. H. Weldon. That said mortgages were given to secure one certain promissory note for $3750.00 dated July 2, 1903, due on July 12, 1903, and given by said mortgagors to plaintiff W. H. Weldon. That said Real estate mortgage embraces and covers a large body of land all situate in Townships thirty (30) and thirty one (31) South of Ranges twenty two (22) and Twenty three (23) in Clark County Kansas. That said real estate is more particularly described in plaintiffs petition filed herein to which reference is hereby made.

That said Chattel Mortgage embraces and includes 1148 head of cattle and 199 head of horses, more particularly described in plaintiff's petition, filed herein, to which reference is hereby made. That judgment will be taken and entered against the makers of said note for the said sum of $3750.00 with interest as therein stated, and for the sale of the real and personal property in said petition described and hereinbefore referred to, or so much thereof as may be necessary to pay said plaintiffs mortgage debt, interest and costs of suit and sale herein.

22 Affiant further swears that the defendant, the Boatmen's Bank, is a corporation domiciled and doing business in the city of St. Louis, Missouri, under the laws of the State of Missouri, and by virtue thereof, and is a non-resident of the State of Kansas, and that personal service of summons cannot be had upon said defendant within the State of Kansas. That the said plaintiff with due diligence is unable to make personal service of summons on said Boatmen's Bank, defendant, and desires to obtain such service by publication. That judgment will be taken against said Boatmen's Bank excluding it from any and all interest in any of the property real or personal, described in plaintiff's petition, under or by virtue of any pretended real or chattel mortgages on the property described in plaintiff's petition, and decreeing the said plaintiff's said mortgages a first lien on the property therein described.

And further affiant sayeth not.

FRANCIS C. PRICE.

Subscribed and sworn to before me this 23rd, day July, 1903. Witness my hand and official seal.

A. BAKER,
Clerk Dist. Court,
By B. C. BAKER, Dupty.

Filed July 23, 1903.

A. BAKER,
Clerk Dis. Court,
By B. C. BAKER, Dupty.

23 *Affidavit of Publication.*

STATE OF KANSAS, *Clark County, ss:*

H. C. Mayse, of lawful age, being duly sworn, deposeth and saith: That he is a Printer, Publisher of the Clark County Clipper, a weekly newspaper; published in the City of Ashland, County of Clark and State of Kansas, and of general circulation in said county, and which said newspaper has been continuously and uninteruptedly published in said county during a period of fifty-two consecutive weeks immediately prior to the first publication of the notice hereinafter mentioned, and that a notice of which a true copy is hereto attached, was published in the regular and entire issue of each number of said newspaper for 3 consecutive weeks; the first publication being made as aforesaid on the 23 day of July 1903.

And affiant further says he has personal knowledge of the statements above set forth, and that they are true.

H. C. MAYSE.

Subscribed and sworn to before me this 10 day of August, A. D. 1903.

[SEAL.] A. BAKER, *C. D. C.*,
By B. C. BAKER, *Deputy.*

Commission expires —— —, 190–.

Printer's Fee, $9.60.

Publication Notice.

The State of Kansas to Boatmen's Bank, of St. Louis, Mo., Greeting:

You will take notice that you have been sued in the District Court of Clark county, Kansas, together with D. G. Fritzlen and Edna P. Fritzlen, by W. H. Weldon as plaintiff. Judgment will be rendered on a promissory note given by said D. G. and Edna P. Fritzlen to plaintiff July 2, 1903, for the sum of $3750,00 due July 12, 1903, and for the foreclosure of a chattel mortgage and a real estate mortgage given by said D. G. and Edna P. Fritzlen to secure the payment of said note. Said chattel mortgage embraces about 1347 head of cattle and horses belonging to said Fritzlen now held on the real estate hereinafter described, known as the Fritzlen ranch. Said real estate mortgage embraces a large body of land in Clark county, Kansas, in townships 30 and 31 south of ranges 22 and 23 west of the 6th p. m. Said property will be ordered sold to pay said plaintiff's mortgage debt interest and costs of suit and sale herein, and *and* a decree will be entered barring and excluding said defendant, Boatmen's Bank of any interest, lien or estate in any of said property, real or personal, under or by virtue of any pretended mortgage, lien or claim it may have on said property, and adjudging any such lien or estate void and subject to plaintiff's said mortgage liens.

Unless you answer or plead to plaintiff's said petition on or before September 4, 1903, judgment will be rendered accordingly.

Witness my hand and seal of office this 23rd day of July, 1903.

A. BAKER,
Clerk District Court, Clark County, Kansas.
[SEAL.] By B. C. BAKER, *Deputy.*

F. C. PRICE,
Attorney for Plaintiff.

First published July 23, 1903—3t.

[Endorsed:] No. —. Clark County Clipper. —— —— *vs.* —— ——. Proof of Publication. Filed this 10 day of August, 1903. A. Baker, C. D. C. B. C. Baker, Deputy.

24 *Publication Notice.*

The State of Kansas to Boatmen's Bank, of St. Louis, Mo., Greeting:

You will take notice that you have been sued in the District Court of Clark County, Kansas, together with, D. G. Fritzlen and Edna P. Fritzlen by W. H. Weldon as plaintiff. Judgment will be entered on a promissory note given by said D. G. & Edna P. Fritzlen to plaintiff, July 2, 1903, for the sum of $3750.00 due July 12, 1903, and for the foreclosure of a Chattel mortgage & a real estate mortgage given by said D. G. and Edna P. Fritzlen to secure the payment of said note. Said chattel mortgage embraces about 1347 head of cattle and horses belonging to said Fritzlen, now held on the real estate hereinafter described, known as the Fritzlen ranch, and said real estate mortgage embraces a large body of land in Clark County, Kansas in Townships 30 and 31 South, of Ranges 22 and 23, west of the 6 P. M.

Said property will be ordered sold to pay said plaintiff's mortgage debt, interest and costs of suit and sale herein, and a decree will be entered, barring and excluding said defendant, Boatmen's Bank of any interest, lien or estate in any of said property, real or personal, under or by virtue of any pretended mortgage, lien or claim it may have on said property, and adjudging any such lien or estate void and subject to plaintiff's said mortgage lien, unless you answer or plead to plaintiff's said petition on or before September 4, 1903, judgment will be entered accordingly.

Witness by hand and seal of office this 23rd, day of July 1903.

F. C. PRICE,
Att'y for Pl't'ff.
[SEAL.]
A. BAKER,
Clerk District Court, Clark County, Kansas,
By B. C. BAKER, *Deputy.*

Filed Aug. 8, 1903.
A. BAKER, *C. D. C.*
B. C. BAKER, *Deputy.*

2—99

25 *Summons.*

(Form 3.)

STATE OF KANSAS, *Clark County, ss:*

The State of Kansas to the Sheriff of Clark County, Greeting:

You are Hereby Commanded, to Notify D. G. Fritzlen and Edna P. Fritzlen that they have been sued in the District Court within and for the County of Clark in the Thirty-first Judicial District of the State of Kansas, and must answer the Petition filed by the Plaintiff W. H. Weldon on or before the 24th day of August 1903, or the said petition will be taken as true, and judgment rendered accordingly. And return this writ on or before the third day of August A. D. 1903.

In Witness Whereof, I have hereunto signed my name and affixed the seal of said Court, at my office in Ashland in said County this 23rd day of July 1903.

[SEAL.]

A. BAKER,
Clerk of the District Court,
B. C. BAKER, *Deputy.*

26 [Endorsed:]

No. 1769.

911.

Summons.

Form 3.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN ET AL., Defendants.

If the defendant fail to answer, the plaintiff will take judgment for $3750.00 Dollars, with interest thereon at the rate of 10 per cent. per annum, from the 12 day of July, 190., and costs of suit.

A. BAKER, *Clerk,*
By B. C. BAKER, *Deputy.*

NOTE.—If the defendant fails to appear judgment cannot be rendered for a larger amount and the costs. G. S. 1868, Ch. 80, § 59.

Issued July 23, 1903.
Returnable August 3, 1903.
Filed July 25, 1903.

A. BAKER, *Clerk,*
By B. C. BAKER, *Deputy.*

Sheriff's Fees.

Serving Summons, first person	$	30
1 Additional persons		25
2 Cop- of Summons		50
Mileage 50 miles	5	00
Total	$6	25

GEO. M. GRIMES, *Sheriff.*

I hereby authorize .... to serve the within Summons.

...., *Sheriff.*

STATE OF KANSAS, ... *County, ss:*

I, the undersigned, do solemnly swear that the times and manner of service of the within Summons, as stated in the annexed Return, is true. So help me God.

....

Subscribed in my presence and sworn to before me, this .. day of .... A. D. 19..

...., *Clerk.*

E. & J. B 2, P. 11.

Received this Writ this 23 day of July 1903, at 12 o'clock A. M. July 24 1903, Served the same by delivering a copy thereof, with the indorsement thereon duly certified, to each of the within named defendant- D. G. Fritzlen and Edna P. Fritzlen Personally.

GEO. M. GRIMES, *Sheriff.*

.... .. 19.., Served the same by leaving a copy thereof, with the indorsement thereon, duly certified, at the usual place of residence of the within named defendant

.....

.....

.....

...., *Sheriff.*

.....A. D. 19.. .....

.....

.....

.....

not summoned.

...., *Sheriff.*

.....

.....

.....

...., *Sheriff.*

STATE OF KANSAS, ... *County, ss:*

I hereby certify the within to be a true and correct copy of th original Summons with the indorsements thereon.

...., *Sheriff.*

27 *Summons.*

(Form 5.)

STATE OF KANSAS,
Clark County, Thirty-first Judicial District, ss:

The State of Kansas to the Sheriff of Clark County, Greeting:

You are Hereby Commanded to notify Boatmen's Bank that the have been sued together with D. G. and Edna P. Fritzlen by W. H Weldon in the District Court, Thirty-first Judicial District, State o Kansas, sitting within and for the County of Clark, and that the must answer the petition filed against them in the Clerk's office of th said Court, on or before the 31st day of August 1903, or such petitio will be taken as true and judgment rendered accordingly.

You will make due return of this Summons on or before the 1 day of August 1903.

In Witness Whereof, I have hereunto signed my name and affixe the seal of said Court, at my office in Ashland, Kansas, in sai County, this 30th day of July 1903.

[SEAL.]

A. BAKER,
Clerk of District Court.
By B. C. BAKER, *Deputy.*

Suit Brought for the Recovery of Money.

Amount claimed .... Dollars with .. per cent. interest on $... from .... 189.; on $.... from .... 189. on $.... from .... .. 189.; on $.... from .... .. 189. and for the costs o this action. Also for the sale of certain lands and tenements, mort gaged to secure the payment of said several sums of money as de scribed and set out in the petition, and for the payment of all ta liens on said lands and tenements.

....,
Clerk of District Court.

28 [Endorsed:]

No. 1769.

943.

Summons.

Form 5.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN ET AL., Defendant-.

If the defendant fail to answer, the plaintiff will take judgment for .... Dollars, with interest thereon at the rate of .. per cent per annum. from the .. day of .... 189. and cost of suit.

...., *Clerk.*

Issued July 30, 1903.
Returnable Aug. 10, 1903.
Filed Aug. 5, 1903.

A. BAKER, *Clerk,*
By B. C. BAKER, *Deputy.*

Sheriff's Fees.

Executing Summons, first person	$ 50
Additional persons	
1 copy of Summons	25
Not found	
Mileage 50 miles	5 00
Total	$5 75

GEO. M. GRIMES, *Sheriff.*

I hereby authorize .... to serve the within Summons.

...., *Sheriff.*

STATE OF KANSAS, ... *County, ss:*

I, the undersigned, do solemnly swear that the times and manner of service of the within Summons, as stated in the annexed return, is true. So help me God.

....

Subscribed in my presence, and sworn to before me, this .. day of .... A. D. 189..

...., *Clerk.*

STATE OF KANSAS, *Clark County, ss:*

Received this Writ July 31, 1903, and as commanded therein I summoned the following persons of the defendants within named, at the times following, to wit:

....., ... 189
....., ... 189
....., ... 189
....., ... 189

by delivering to each of said defendants personally, in said County, a true copy of the within summons, with all the indorsements thereon.

And I summoned the following persons of the defendants within named, at the times following, to wit:

....., ... 189
....., ... 189
....., ... 189
....., ... 189

by leaving at the usual place of residence of each of said defendants, in said County, a true copy of the within summons with all the indorsements thereon.

The following named persons of the within defendants not found in my County.

.....
.....
.....

...., ..., *Sheriff,*
By ...., ..., *Deputy.*

STATE OF KANSAS, *Clark County, ss:*

Received this writ July 31, 1903, and being unable to find any of the officers of the Boatmen's Bank, in my County, I delivered a true, certified copy of this summons to C. F. Lukens, an employee of Boatmen's Bank, in said county, this 3 day of August 1903.

GEO. M. GRIMES,
Sheriff, Clark County, Kansas.

29 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, BOATMEN'S BANK, Defendants.

Application for Temporary Injunction.

Now comes the plaintiff herein by his attorney, F. C. Price, and moves the court to grant a temporary injunction directed to all of the defendants herein enjoining them and each of them from moving any of the personal property described in the petition herein from

Clark County, Kansas pending the final determination of this cause for the following reasons to-wit:

The Boatmen's Bank, defendant herein, claims the legal title and right of possession of all of said personal property by virtue of certain chattel mortgages, which, it is alleged by said Boatmen's Bank, constitute liens upon said personal property.

That said chattel mortgages are illegal and void and the consideration therefor is illegal and void and said chattel mortgages do not constitute any lien upon said personal property.

That nothwithstanding the illegality and invalidity of said pretended claims, the said bank, claiming as it does, to hold the legal title of said personal property, will attempt to summarily get possession of said personal property by reason of certain stipulations contained in said pretended liens, giving to said bank the right of possession of said personal property upon default in the payment of the notes as security for which said mortgages were given.

That if said personal property shall be reduced to possession under said pretended stipulations by said bank, an attempt will be made to ship the same out of the jurisdiction of this court and it will therefore be sold, and no sale ordered by this court thereon could be consummated.

F. C. PRICE,
Attorney for Plaintiff.

30 STATE OF KANSAS, *County of Miami, ss:*

W. H. Weldon of lawful age, being first duly sworn, on his oath says that he is the plaintiff in the above entitled action.

That he has read the foregoing application for a temporary injunction and that the statements made therein are true to the best of his information, knowledge and belief.

W. H. WELDON.

Subscribed and sworn to before me this July 23rd, 1903.
[SEAL.] J. M. REED,
Notary Public.

My Com. expires Apr. 17, 1905.

Filed July 30, 1903.
A. BAKER, *C. D. C.*
By B. C. BAKER, *Deputy.*

31 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, BOATMEN'S BANK, Defendants.

Affidavit.

STATE OF KANSAS, *Clark County, ss:*

F. C. Price, of lawful age, being first duly sworn, on his oath says that he is the attorney for the plaintiff herein; that he is personally

acquainted with Hon. Ed Madison who is the sole and presiding Judge of the District Court of Clark County, Kansas; that affiant knows that the said Judge of the District Court of Clark County, Kansas is now absent from said county.

Further affiant does not say.

F. C. PRICE.

Subscribed and sworn to before me this July 30th, 1903.

[SEAL.] J. M. MENDENHALL,
Probate Judge.

Filed Sept. 10, 1903.
A. BAKER, *C. D. C.*

Filed this 30 day of July 1903.

J. M. MENDENHALL,
Probate Judge, Clark Co., Kans.

32 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, BOATMEN'S BANK, Defendants.

Application to the Probate Judge of Clark County, Kansas, for a restraining order in the above entitled cause.

Now comes the plaintiff W. H. Weldon, by his attorney, F. C. Price, and shows to the Honorable Probate Judge of Clark County, Kansas that the Judge of the District Court of Clark County is absent from said County.

That there is on file in this cause in the office of the Clerk of the District Court of Clark County, Kansas an application for a temporary injunction against the defendants herein and that there is need for an order temporarily restraining the said defendants from interfering with the personal property, which is, among other things, the subject matter of this suit.

Wherefore the plaintiff prays the Honorable Probate Judge of Clark County, Kansas to issue a temporary restraining order directing the said defendants not to interfere with any of the personal property mentioned in the petition until such time as the said application for a temporary injunction can be heard by the Judge of the District Court of Clark County, Kansas.

F. C. PRICE,
Attorney for Plaintiff.

Filed Sep. 10, 1903.
A. BAKER, *C. D. C.*

Filed this 30" day of July 1903.

J. M. MENDENHALL,
Probate Judge, Clark Co., Kans.

33 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDAN P. FRITZLEN, BOATMEN'S BANK, Defendants.

Proceedings Before the Honorable Probate Judge of Clark County, Kansas.

Now on this July 30 1903, it being made to appear to me, the undersigned Probate Judge of Clark County, Kansas, that Hon. Ed Madison the sole and presiding judge of the District Court of Clark County, Kansas, is absent from Clark County, Kansas, the application of the plaintiff herein for a restraining order directed to the defendants herein to preserve the present status of the personal property, which is the subject matter of this said action, and which is more particularly described in the petition in said action, now comes on to be heard and thereupon it is ordered that D. G. Fritzlen, Edna P. Fritzlen and the Boatmen's Bank in the above entitled cause be and each of them *are* hereby restrained from in any manner whatever disposing of the personal property mentioned in the petition herein and in removing any of it from Clark County, Kansas until the hearing and determination of the plaintiff's application for a temporary injunction by the regular judge of the District Court of Clark County, Kansas.

Let a copy of this order be served upon each of said defendants.

Done at my office in the city of Ashland, Clark County, Kansas, this July 30, 1903.

[SEAL.] J. M. MENDENHALL,
Probate Judge.

Received this writ July 31, 1903. Served the same Aug. 3, 1903 by delivering a copy thereof to Edna P. Fritzlen & leaving same at usual place of residence of D. G. Fritzlen. And by delivering a copy thereof to C. F. Lukens personally, he being an employee of said Boatmen's Bank in my county.

GEO. M. GRIMES, *Sheriff.*

Filed Sept. 10, 1903.
A. BAKER, *C. D. C.*

Filed this July 30" 1903.

J. M. MENDENHALL,
Probate Judge Clark Co., Kansas.

34 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN and EDNA P. FRITZLEN, and BOATMEN'S BANK OF ST. LOUIS, Defendants.

Demurrer.

And now at this day comes said defendant, Boatmen's Bank of St. Louis, Missouri, by its attorneys, and demurs to the petition in this cause, and in support of its demurrer said defendant assigns the following grounds, to-wit:

(1) Several causes of action are improperly joined in the petition herein, in this to-wit, that plaintiff has joined in his petition a cause of action in favor of plaintiff and against defendants D. G. Fritzlen and Edna P. Fritzlen for the foreclosure of plaintiff's mortgage, and plaintiff has united with said cause of action against defendants Fritzlen and Fritzlen a separate cause of action in favor of plaintiff and against the Boatmen's Bank.

(2) Said petition does not state facts sufficeint to constitute a cause of action, in this, to-wit, that said petition does not state any fact or circumstance showing the prior mortgage of said Boatmen's Bank to be invalid.

(3) Said petition does not in other respects state facts sufficient to constitute a cause of action.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Defendant, Boatmen's Bank.

Filed Aug. 13, 1903.
A. BAKER, *C. D. C.*
By B. C. BAKER, *Deputy.*

35 In the District Court of Clark County, Kansas.

W. H. WELDEN, Plaintiff,
vs.
D. G. FRITZLEN and EDNA P. FRITZLEN, and BOATMEN'S BANK OF ST. LOUIS, MISSOURI, Defendants.

Petition of defendant Boatmen's Bank for the Removal of this cause to the United States Circuit Court for the District of Kansas, sitting in the Second Division thereof.

To said Court:

Your Petitioner, the Boatmen's Bank of St. Louis, Missouri, one of the defendants in the above entitled cause respectfully shows that the matter and amount in dispute in this suit exceeds, exclusive of interest and costs, the sum and value of two thousand dollars; that

the property described in plaintiff's petition is worth about $30,000. and much in excess of $20,000., and that the prior mortgages held on said property by said Boatmen's Bank were given and are held by said Boatmen's Bank to secure an indebtedness due said Bank from said D. G. Fritzlen and Edna P. Fritzlen in the sum of $32920.15 with interest at 8% per annum from November 30th, 1901, and that said plaintiff, as will appear by his petition herein, is seeking to establish a first and prior lien on and against said property in the sum of $3750.00.

Your Petitioner further shows that this defendant is a corporation created and existing, as averred in plaintiff's petition, under the laws of the State of Missouri, and has its principal office at the City of St. Louis in said State, and that therefore, before, at, and ever since, and for a long time prior to the bringing of this suit, said Boatmen's Bank was and still is a corporation duly created under the laws of and a citizen of the State of Missouri.

That said Bank is engaged in the banking business in the City of St. Louis, Missouri.

Your Petitioner further avers and shows that said plaintiff W. H. Welden and the defendants D. G. and Edna P. Fritzlen were at the time of the bringing of this suit, and ever since have been and for more than two years prior to the bringing of this suit
36 had been and still are citizens of the State of Kansas and residents of the County of Clark in said State of Kansas.

Your Petitioner further shows and avers that the controversy herein as to whether the alleged mortgage of plaintiff or the prior mortgage of said Boatmen's Bank on the properties described in plaintiff's petition is prior and paramount, is a separable controversy wholly between plaintiff and said Boatmen's Bank, and that said controversy can be determined herein fully as between the plaintiff and said Boatmen's Bank. Wherefore, said Boatmen's Bank prays the Court *of* make an order removing this cause to said United States Circuit Court for the District of Kansas sitting in the Second Division thereof.

For a still further ground and cause of removal herein said Boatmen's Bank shows and avers that the controversy herein is between the plaintiff and said Boatmen's Bank, and that by reason of prejudice against said Boatmen's Bank, and the local influence of said plaintiff, Welden, and of the defendants, D. G. and Edna Fritzlen in said Clark County, Kansas, said Boatmen's Bank will not be able to obtain justice in this cause in the District Court of said Clark County, Kansas, and that said Boatmen's Bank does not have the right under the Laws of Kansas to remove said cause to some other county other than said Clark County on account of said prejudice and local influence, and defendant Boatmen's Bank shows and avers that said plaintiff is a public official of said Clark County, Kansas; that said plaintiff is and has been a member of the Kansas Legislature, and that said plaintiff attends the political conventions of his party, which is a dominant party in said Clark County, and is influential in shaping the policy of said County and in electing the Judge, Clerk, Sheriff and other officers of said District Court,

and in the selection of juries, and is a man of wide and extensive influence in said County, and that said defendants D. G. and Edna P. Fritzlen although united with said Boatmen's Bank as defendants herein, are on the same side of the controversy herein with said plaintiff Welden, and that said defendants, Fritzlen and Fritzlen, are and for many years last past have been prominent citizens of said Clark County, Kansas, and of wide and extensive influence therein, and that said Fritzlens also take a prominent part in the public affairs of said County, and by reason of the controversy
37 herein between them and said Boatmen's Bank, which has extended back for two years last past, have caused and engendered against said Boatmen's Bank in said Clark County a prejudice; that said Fritzlens and plaintiff Welden are stockmen engaged extensively in the cattle business in said Clark County; that the chief industry in said County is and for many years has been the cattle and live stock business and that said Fritzlens and plaintiff Welden by reason of the controversy herein with said Boatmen's Bank have caused a prejudice to extend among cattlemen generally in said County against said Boatmen's Bank and that by reason of the local influence of said plaintiff and said Fritzlens in said County, and by reason of the prejudice which they have caused to exist against said Boatmen's Bank in said County, said Boatmen's Bank would not be able to obtain justice in said District Court in this cause, and said Bank shows and avers that there is much prejudice in said Clark County, Kansas, against foreign corporations and banks.

Wherefore, said Boatmen's Bank prays the Court to make and order removing this cause to said Circuit Court of the United States for the District of Kansas, sitting in the Second Division thereof.

And for a still further and additional ground for the removal of this cause, your Petitioner shows to the Court and avers that with respect to the controversy herein with respect to the Boatmen's Bank said plaintiff Welden and said defendants D. G. and Edna P. Fritzlen are on one side and allied together and are each and all of them hostile to this defendant, the Boatmen's Bank, and that therefore this suit in its entirety is a controversy between citizens of different States, to-wit, the plaintiff Welden and defendants Fritzlen and Fritzlen are citizens of the State of Kansas, and this plaintiff the Boatmen's Bank is a citizen of the State of Missouri.

The premises considered, this defendant, the Boatmen's Bank, prays the Court to take no further steps in this cause, and tenders herewith a good and sufficient bond for the purposes of removal hereby prayed for, and said petitioner prays that this cause may be removed from said District Court of Clark County, Kansas, to said United States Circuit Court for the District of Kansas sitting in the Second Division thereof.

38 BOATMEN'S BANK OF SAINT LOUIS, MO.,
By G. M. SMITH, *Agent.*
BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Boatmen's Bank.

UNITED STATES OF AMERICA,
Western District of Missouri, Jackson County, ss:

G. M. Smith being duly sworn, on his oath says that he is and for about two years last past has been the agent of said Boatmen's Bank at Kansas City, Missouri, and as such had and still has charge of the interests of said Bank growing out of its mortgages held by it and made by the defendants Fritzlen herein; that he has read the above and foregoing petition for removal of this cause to the U. S. Circuit Court for the District of Kansas, and that the matters stated and charged in said petition are true.

G. M. SMITH.

Subscribed and sworn to before me this 10 day of August, 1903.
My Commission expires Dec. 19th 1904.
[SEAL.] GOODWIN CREASON,
Notary Public.

Filed Aug. 13, 1903.
A. BAKER, *C. D. C.*
By B. C. BAKER, *Deputy.*

39 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and THE BOATMENS BANK OF ST. LOUIS, MISSOURI, Defendants.

Bond for Removal to the U. S. Circuit Court.

Know all men by these presents, That the Boatmens Bank as principal, and Rufus I. Lackland, Granville M. Smith and Am. Bonding Co., as surety are held and firmly bound unto W. H. Welden, the plaintiff in the above entitled cause, his executors, heirs and assigns in the sum of five hundred ($500.00) dollars, lawful money of the United States for the payment of which well and truly to be made, we jointly and severally bind ourselves and each of us by these presents.

The conditions of this obligation are such, that whereas, said Boatmens Bank has applied by petition to the District Court of Clark County, Kansas, for the removal of the above entitled cause therein pending to the Circuit Court of the United States for the District of Kansas, Second Division, for further proceedings therein on the grounds in said petition set forth, and that all further proceedings in said District Court be stayed:

Now Therefore, if your Petitioner, said Boatmens Bank shall enter in said Circuit Court of the United States for the District of Kansas, Second Division, on or before the first day of the next regular session thereof the copy of the record in said suit, and shall pay or cause to be paid all costs that may be awarded therein by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then the above and foregoing

obligation shall be null and void, otherwise the same shall remain i
full force and effect.

In Witness Whereof, the said Bank has signed these presents an
said surety has signed and sealed this obligation this — day of Au
gust, 1903.

BOATMENS BANK,
By M. H. THOMSON, *Cash.*

[SEAL.]

RUFUS I. LACKLAND.
GRANVILLE M. SMITH.
AMERICAN BONDING COMPANY
OF BALTIMORE,
By WASH ADAMS, *Vice-Pres't.*

Attest:
HARRY B. WALKER, [SEAL.]
Ass't Sec'y.

STATE OF MISSOURI, *County of Jackson, ss:*

The Within Granville M. Smith, being sworn says that he executed the Within bond as one of the sureties and that he owns real estat in Rooks county, Kansas worth $15000 clear, and bond stock a Garden City, Kansas, Worth $20.000. Affiant says he is agent o said Boatmens Bank at Kansas City, Mo., that Rufus I. Lackland whose name is signed as surety to the within bond, is President o said Bank and is worth very much in excess of $50.000.

G. M. SMITH.

Sworn to and subscribed before me this August 10, 1903.
GOODWIN CREASON, [SEAL.]
Notary Public.

My Commission Expires Dec. 19th, 1904.

Filed Aug. 13, 1903.
A. BAKER, *C. D. C.*,
By B. C. BAKER, *Deputy.*

Approved this 13 day of August, 1903.
A. BAKER, *C. D. C.* [SEAL.]

40 In the U. S. Circuit Court for the District of Kansas, Second Division.

No. 1009.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and BOATMENS BANK, Defendants.

And now come said parties plaintiff and defendants, and the mo tions to remand this cause to the District Court of Clark County, Kan

sas, of the plaintiff and of defendants D. G. Fritzlen and Edna P. Fritzlen coming on to be heard the court finds from the pleadings and record that this suit is a controversy between plaintiff and defendants D. G. Fritzlen and Edna P. Fritzlen who are citizens of the State of Kansas on the one side and the defendant Boatmen's Bank which is a citizen of the State of Missouri on the other side of said controversy that said Boatmen's Bank had the right to remove this cause to this court and said motions to remand are accordingly overruled and denied.

The petition for a removal for local prejudice was not considered.

It is further ordered that the motion herein of said Boatmen's Bank to dissolve the restraining order, granted herein by the Probate Judge of Clark County, Kansas, be and the same is hereby sustained and that the applications for an injunction be denied.

It is further ordered that Plaintiff have 30 days within which to replead and recast his pleadings in this cause.

It is further ordered that the Clerk of this Court forthwith transmit by mail by registered letter a duly certified copy of this order to the Clerk of the District Court of Clark County, Kansas, at Ashland, Kansas.

Sept. 14, 1903.

WM. LOCHREN, *Judge.*

Endorsed: No. 1009. Order filed September 14, 1903, Geo. F. Sharitt, Clerk, by J. F. Shearman, D. C.

41 UNITED STATES OF AMERICA,
District of Kansas, Second Division, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of an order in No. 1009, W. H. Welden *vs.* D. G. Fritzlen *et al.*, as the same now appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Wichita, in said District, this 15th day of September, A. D. 1903.

[SEAL.] GEO. F. SHARITT, *Clerk.*

Filed Sept. 17, 1903.
A. BAKER, *C. D. C.*

42 In the District Court of Clark County, Kansas.

W. H. WELDEN, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and BOATMENS BANK, Defendants.

And now at this day again comes the said defendant Boatmens Bank, by its attorneys, and entering its appearance herein at this time specially and for the purposes only of this motion, said Boat-

mens Bank moves the Court herein to proceed no further in this cause, and to strike this cause from the docket of this Court for the reason, that following the filing in this Court by said Boatmens Bank of its petition and bond for the removal of this cause to the United States Circuit Court said Boatmens Bank, by its attorneys, procured from the Clerk of this Court a duly Certified transcript of the records and papers on file in this cause, including said petition and bond for removal, and thereupon filed the same in said United States Circuit Court for the District of Kansas sitting in the Second Division thereof at Wichita, Kansas, and that afterwards, to-wit, on September 14th, 1903, on the first day of the September Term, 1903, of said United States Circuit Court, all of the parties to said cause appeared in said U. S. Circuit Court, the said plaintiff Welden appearing by his attorneys, Messrs. Price & Vermillion, and the defendants D. G. and Edna P. Fritzlen appearing by their attorneys, Messrs. Harry J. Bone and Hite & Nichols, and the defendant Boatmens Bank appearing by its attorneys, Botsford, Deatherage & Young. And that thereupon said plaintiff and said defendants D. G. and Edna P. Fritzlen, by their attorneys, filed motions in said cause in said U. S. Circuit Court to remand said cause to this Court, and which motions being thereupon taken up and argued by said counsel of plaintiff and of said defendants Fritzlen and Fritzlen and said Boatmens Bank, it was adjudged by said U. S. Circuit Court on said motions that said cause was properly removed from this Court to said U. S. Circuit Court and involved a controversy between citizens of different States, and said motions to remand were accordingly,
43 by said U. S. Circuit Court, after said hearing, overruled and said cause was retained and is still pending in said U. S. Circuit Court.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Defendant Boatmens Bank.

Service of the above notice is acknowledged this September 21, 1903.

HITE & NICHOLS,
Attorneys for D. G., and Edna P. Fritzlen.

Filed Sept. 22, 1903.
A. BAKER, *C. D. C.*

44 In the Circuit Court of the United States for the District of Kansas, Second Division.

No. 1009. Equity.

W. H. WELDON
v.
D. G. FRITZLEN, EDNA P. FRITZLEN, and THE BOATMEN'S BANK.

Order.

This cause having been fully presented to the court in oral argument and upon written briefs of parties fully submitted to the court upon motion to remand the case to the state court from whence it came, by the court taken and held under advisement until this second day of April, 1904, it is now ordered — the motion of plaintiff filed herein to remand the case to the state court from whence it came, be, and is hereby sustained in accordance with the written opinion of the court upon said motion to remand herewith filed. To which ruling defendant The Boatmen's Bank excepts.

JOHN C. POLLOCK, *Judge.*

April 2, 1904.

Endorsed: No. 1009. Order. Filed April 2, 1904. Geo. F. Sharitt, Clerk.

45 UNITED STATES OF AMERICA,
District of Kansas, Second Division, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of an Order remanding the case to State Court in No. 1009—W. H. Weldon *vs.* D. G. Fritzlen, *et al.,* as the same now appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Wichita, in said District, this 4th day of April, A. D. 1904.

[SEAL.] GEO. F. SHARITT, *Clerk.*

Filed April 5, 1904.
A. BAKER, *C. D. C.*

46 In the District Court of Clark County, Kansas.

W. H. WELDEN, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN and BOATMEN'S BANK OF ST. LOUIS, MO., Defendants.

Comes now again said defendant Boatmen's Bank and withdraws its demurrer to the petition in this suit, and thereupon files answer herein.

E. H. MADISON, *Judge.*

Filed May 16, 1904.
A. BAKER, *C. D. C.*
3—99

47 In the District Court of Clark County, Kansas.

W. H. WELDEN, Plaintiff,
vs.
D. G. FRITZLEN, ENDA P. FRITZLEN and BOATMEN'S BANK, Defendants.

Answer.

And now at this day again comes said defendant, Boatmen's Bank by its attorneys, and for answer to the petition of plaintiff in the above entitled action said Boatmen's Bank denies generally each and every allegation, averment and matter of whatsoever kind in the petition of plaintiff in the above entitled cause contained.

Said defendant Boatmen's Bank states that it holds a chattel mortgage on all of the personal property described in the plaintiff's petition herein which was executed by said defendant D. G. Fritzlen on November 30th, 1901, and that said chattel mortgage was recorded in the office of the Register of Deeds of said Clark County, Kansas, on December 6th, 1901. Said mortgage was made to secure the note hereinafter mentioned.

Said defendant Boatmen's Bank further states that it holds a mortgage covering said real estate described in plaintiff's petition herein which was executed and delivered by said defendants D. C. Fritzlen and Edna P. Fritzlen on said November 30th, 1901, and that said last mortgage being by them duly acknowledged was recorded in the office of the Register of Deeds of said Clark County, Kansas, on December 6th, 1901, which said last mortgage was also executed, delivered and acknowledged and recorded for the purpose of securing said note hereinafter referred to; that said note which was so secured by said chattel mortgage and by said real estate mortgage was executed and delivered on said November 30th, 1901, by said D. G. Fritzlen payable to the order of John H. Pinnell for the sum of $32,920.15 for value received, at the Boatmen's Bank, St. Louis, Missouri, with interest from date at the rate of 8% per annum until paid, and that by said note said D. G. Fritzlen promised to pay said sum eleven months after the date of said note, to-wit, eleven months after November 30th, 1901, and that immediately upon the giving of said note said Pinnell, by endorsement on the back of said note endorsed, sold and delivered said note to said Boatmen's Bank and that said Bank has ever since been the owner and holder of said note and of said two mortgages given to secure the payment of the same.

Copies of said two mortgages and of said note are filed herewith, marked Exhibits A, B and C.

Said Boatmen's Bank says that by virtue of said note and two mortgages the right, title lien and claim of said Boatmen's Bank to said real and personal property described in plaintiff's petition is paramount to any right, title, lien or claim thereto of said plaintiff.

Wherefore, having fully answered said Boatmen's Bank prays

judgment and that it may go hence without day with its costs laid out and expended.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Defendant Boatmen's Bank.

48 Ex. A.

Copy.

Collat. No. 5700 Transferred fro, B/B #93689. In payt. of Smith's draft attached as per his let. 2/20/02 filed with S. Harrison 96770 farm.

$32920.15. BUCKLIN, KAS., *Nov.* 30, 1901.

Eleven months after date I promise to pay to the order of John H. Pinnel, thirty two thousand, nine hundred twenty and 15/100 dollars. For value received at the Boatmen's Bank, St. Louis, Mo. with interest from date at the rate of eight per cent. per annum until paid.

D. G. FRITZLEN.

Received Nov. 18, 1902, $5281.50 on a/c of this note per G. M. Smith let. 11/17/02.

E. L. TAYLOR, *N. C.*

Pay to Order of Boatmen's Bank of St. Louis, Mo., without recourse.

JNO. H. PINNELL.

2411.15
35334.30
138.48

35472.78
5281.50 12/3/02

30165.27
104.76

30060.51
7.33

30050.18
12.05

30041.13
11.50

30029.6

Due—
Nov. 2, 1902.

49 Ex. B.

This writing witnesseth, That D. G. Fritzlen (P. O. Bucklin, Ka
sas) of Clark County, first party, is indebted to Jno. H. Pinn
second party upon their one promissory note bearing date the 30
day of November, 1901, as follows:

One note for $32920.15 dated Nov. 30, 1901, payable eleven mont
after date, and payable at the Boatmens' Bank, St. Louis, Missou
with interest thereon at the rate of 8 % per annum from date. A
in consideration of said indebtedness and in contemplation of futu
indebtedness the first party hereby sell and transfer to the seco
party the following described personal property, to-wit:

1461 head of cattle of the following enumeration and descriptio
to-wit: 522 head of heifers and cows, 2 to 6 years old, branded
one of the following brands, *i. e.*,)—(on left hip or H on left hip
W on left hip or CH on left hip; 104 head of steers 2 year- old; 1
head of steers one year old; 118 head of heifers, one year old; 2
head of calves, steers and heifers. The said last above describ
604 head of cattle, are branded H. on left hip and earmarked (
317 head of calves, steers and heifers, branded H. on left hip a
tally brand / on left side of neck, and ear marked (; 8 head
bulls, Whitefaced, 4 years old; 5 head of bulls Grade-Shorthor
yearlings past; 6 head of bulls, Shorthorn. The said last above
scribed 19 cattle are branded H on left hop. Also 171 head of hor
and 8 head of mules of the following enumeration and descriptio
to-wit; 60 head of mares, 2 to 8 years old; 42 head of horses, 4 t
years old; 24 head of yearlings, mixed. The said last above
scribed 132 head of horses are branded 7 on left shoulder. 3 ma
8 years old, branded 77 on right hip; 2 work horses 10 years o
branded H on left hip; 1 bay saddle horse, 10 years old branded
on left hip; 1 gray saddle horse, 10 years old, branded EF
shoulder; 1 gray saddle horse, 10 years old, branded 2 on should
1 dun saddle horse, 10 years old branded + on thigh; 1 brown sad
horse, 10 years old branded ∪–|⁄ on shoulder; 4 bay mares, 7 t
years old, no brands; 1 black mare 8 years old, no brands; 5 ba
yearling colts, no brands; 19 Spring 1901 colts, no brands; 5 mu
2 gray, 2 black and 1 brown, no brands; 3 mules, black, brande
on left shoulder, 4 to 8 years old; Also feed of the following descr
tion; to-wit; 23 ricks of headed wheat; 40 acres of bound sorghu
30 tons of wheat and barley strew; 75 acres of rye pasture; 300 ac
of wheat pasture; Also the following wagons, harness and farm i
plements, 4 farm wagons, including 2 bain, 1 Capitol, and 1 Birds
6 sets of harness including 2 sets of leather tug harness and 4 set
chain tug harness; 2 McCormick corn binders and harvesters
Deering binder and harvester; 1 Havana Disk wheat drill; 1 M
Cormick mower and 2 riding disk cultivators and 1 riding lister.'

It is the intention of this instrument to convey title to all cat
horses and mules in above brands, also all wagons, harness, fa
implements and feed now owned by the said mortgagor and it is
intention to convey title to said cattle and horses and mules whet

brands described, be located on the parts of animals as herein stated or on any parts — the animals whatsoever or whether said animals be branded in no manner whatsoever. All of the above described property is located upon the ranch of the first party, said ranch being situate about twenty five miles north from Ashland, in the County of Clark and State of Kansas, in Lieuthstrom and Letitia Townships, and extending North to the Chicago, Rock Island & P. R. R. in the County of Ford and State of Kansas. Also all division and cross fencing, including wire, post and gates; also all wind-mills with attachments and appurtenances thereto; also all water tanks, water and feed troughs and all equipments of whatsoever description owned by said mortgagor now on said ranch.

Together with all increase whether by purchase or otherwise. The marks and brands used above to describe said cattle are the holding marks and brands and carry the title, although said cattle may have other marks and brands. This sale is a mortgage upon the following conditions: The first party shall pay to the second part-:

1st. The indebtedness above described when the same becomes due, either as above set forth or according to the terms of any extensions or renewal note or obligation.

2nd. All sums loaned advanced or expended by the second party for the maintenance or transportation of said property or for any purpose connected therewith, add all indebtedness to the second party, as commission, or otherwise, for services in connection with any part of the same.

3rd. All indebtedness of any character created or maturing while any indebtedness of the character mentioned in the two foregoing paragraphs remains unpaid. Until default herein, or until possession is taken by the second party, the first party may retain possession of said property. Said cattle when marketed at Kansas City Stock Yards, Mo. or any other live stock center shall be consigned to the second party or his assigns. This mortgage covers and includes all the live stock now owned or controlled by the said first party of the above classes, ages and brands, and located as above described, and also covers and includes all the right, title and interest or the first parties in and to the pasturage, feed troughs and water privileges now used in feeding said live stock. The first party hereby agrees not to make a second mortgage or lien upon said property, or to remove same from its present location without the written consent of the said second party. In case of a sale or attempted sale, or removal or attempted removal of said chattels or any part thereof from said premises, said second party, successors or assigns shall have the right to take immediate possession of said property and sell same at public auction or private sale as he shall deem best. If all the conditions herein expressed are complied with, this mortgage shall be void; but if the first part- shall fail to pay any part of the indebtedness secured hereby when due or shall fail to comply with any of the conditions herein expressed, or if from any cause the holder thereof shall deem himself insecure, then all of the indebtedness hereby secured, shall at the option of the holder

hereof become due and payable, and it shall be lawful for the second party, its successors and assigns or the agents of the same, to enter upon any place where said property may be and take possession thereof and to sell the same at public auction or private sale with or without notice at any convenient place or after transportation to Kansas City Stock Yards, Kansas City, Mo. or any other live stock center and out of the proceeds to retain the amount of the costs and expenses together with the amount of money which may at the time be due from first party the same to be applied to such indebtedness in the above numbered order, the surplus to be paid to the first party or his legal representatives. It is understood that any future transactions by which the first party may become indebted to the second party during the existence of this mortgage are to be based upon the same as security.

For the purpose of obtaining the money at this time loaned by the second party, and the benefit of future transactions, the first party states that he is the absolute owner of all the above described property, that the same is free from any incumbrance, and that all of the same is now in his possession on the premises above described, and for said purpose hereby represents and guarantees that the number is not less than above stated.

In Witness Whereof, The first party has hereunto set his hand this thirtieth day of November, 1901.

D. G. FRITZLEN.

Executed in *our* presence:
DELIA C. STEVENSON.

51 *Affidavit of Ownership.*

STATE OF ——, *County of* ——, *ss:*

To obtain credit for the within amount —— —— being duly sworn upon his oath says that the property in number and kind as designated in the within instrument is now located at the place or places stated in this instrument, and that the mortgagor herein — the lawful and absolute owner of said property described, that he has full power and authority to sell or mortgage *and* same and give clear title thereto, and that there are no liens or mortgages against said property, except as herein given.

D. G. FRITZLEN.

Subscribed and sworn to before me this fifth day of December, 1901.

[L. S.] M. G. STEVENSON,
Notary Public.

Com. exp. Oct. 5, 1903.

Acknowledgment.

STATE OF KANSAS, *County of Clark, ss:*

On this fifth day of December, 1901, before me the undersigned, a notary Public duly commissioned and acting within and for the

County of Clark State of Kansas personally came before me, D. G. Fritzlen to me personally known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed for the purposes and considerations therein mentioned. In Witness Whereof I have hereunto set me hand and affixed my official seal at my office in Ashland, Kansas, County of Clark this 5 day of December, 1901.

[L. S.] M. G. STEVENSON,
Notary Public.

My Commission expires Oct. 5-1903.

New Mtge. No. ——.

Chattel Mortgage.

From D. G. Fritzlen to John H. Pinnell.

STATE OF KANSAS, *County of Clark, ss:*

I, Manfred Brown, Register of Deeds of said County, do hereby certify that a copy of the within instrument was filed for record on the 6th, day of December 1901 at 9:15 o'clock a. m. and duly recorded in Book 6, at Page 101 having affixed $—— Revenue stamps duly cancelled according to law.

[L. S.] MANFRED BROWN,
Register of Deeds.

John G. Pinnell, Stock Yards, Kansas City, Missouri.

52 Ex. C.

This Mortgage made this 30th, day of November in the year of our Lord One Thousand Nine Hundred and One by and between D. G. Fritzlen and Edna P. Fritzlen (Husband and wife) of the County of Clark and State of Kansas party of the first part, and John H. Pinnell of the County of Jackson and State of Missouri, party of the second part, Witnesseth: That said party of the first part, for and in consideration of the sum of Thirty two thousand nine hundred and twenty and 15/100 Dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, *has* granted, bargained sold and conveyed and by these presents do grant, bargain sell and convey unto the said party of the second part and to his heirs and assigns forever all of the following described tracts, pieces and parcels of land lying and situate in the County of Clark, and State of Kansas, to-wit:

N. E. ¼ of N. E. ¼ Sec. 33, Town. 30 Range 22; Also W. ½ of N. W. ¼ and N. W. ¼ of S. W. ¼ Sec. 34, Town. 30, Range 22; Also S. E. ¼ of S. W. ¼, Sec. 6, Town. 31, Range 22; Also Lot 2 and E. ½ of N. W. ¼, Sec. 7, Town. 31, Range 22. Also N. E. 1/*e* Sec. 12, Town. 31 Range 23; Also N. W. ¼ Sec. 12, Town. 31, Range 23; *Also* S. ½ of S. W. ¼ Sec. 1 and S. E. ¼ of S. E. ¼, Sec. 2 and N. E. ¼ of Sec. 11 all in Township 31, Range 23; Also

S. E. ¼ Sec. 4 N. W. ¼ Sec. 10, N. E. ¼ Sec. 9, S. W. ¼ of Sec. 9, S. E. ¼ Sec. 9 all in Township 31, Range 23; Also Lots 1 and 3 and S. E. ¼ of N. E. ¼ and E. ½ of S. E. ¼ Sec. One (1) and E. ½ of S. E. ¼ and S. W. ¼ of S. E. ¼ and S. E. ¼ of N. E. ¼ Sec. 11; Also S. ½ of N. W. ¼ and N. ½ of S. E. ¼ Sec. 13 and N. E. ¼ and N. W. ¼ and S. W. ¼ and S. E. ¼ Sec. 14; also S. ½ of N. E. ¼ and N. ½ of S. E. ¼ Sec. 24; also S. W. ¼ of S. E. ¼ and S. E. ¼ of S. W. ¼ Sec. 24; also E. ½ of N. W. ¼ Sec. 25; also W. ½ of N. E. ¼ and N. E. ¼ of N. W. ¼ and N. W. ¼ of S. E. ¼ Sec. 21; also N. ½ of N. E. ¼ and N. ½ of N. W. ¼ of Sec. 22; also S. W. ¼ of N. W. ¼ and N. ½ of S. W. ¼ and N. W. ¼ of S. E. ¼ Sec. 11; also N. E. ¼ of N. E. ¼ of Sec. 21; also S. E. ¼ of N. W. ¼ Sec. 22; also S. W. ¼ of S. W. ¼ of Sec. 21; also E. ½ of N. E. ¼ of Sec. 28 and S. W. ¼ of N. W. ¼ Sec. 27; also W. ½ of S. W. ¼ of Sec. 27 and N. ½ of S. E. ¼ of Sec. 28; also S. ½ N. W. ¼ and N. ½ S. W. ¼ and S. ½ of S. W. ¼ and S. E. ¼ and N. E. ¼, Sec. 35 all in Town. 30, Range 23; also W. ½ N. E. ¼ and S. E. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼ and S. ½ of S. E. ¼ and S. E. ¼ of S. W. ¼ Sec. 3; also S. W. ¼ of S. W. ¼ Sec. 2 and N. ½ of N. W. ¼ and N. W. ¼ of N. E. ¼ Sec. 11 and S. W. ¼ of N. E. ¼ and N. W. ¼ of S. E. ¼ and E. ½ of S. W. ¼ Sec. 11 all in Town. 31, Range 23; also W. ½ of N. W. ¼ and W. ½ of S. W. ¼ Sec. 23, Town. 30, Range 23, Containing 5328 acres.

To have and to Hold the same with all and singular *and* hereditaments and appurtenances thereto belonging, unto the said party of the second part and to his heirs and assigns forever, provided, always, and this instrument is made, executed and delivered upon the following conditions to-wit: Whereas, D. G. Fritzlen and Edna P. Fritzlen the said party of the first part *has* this day made, executed and delivered to the said party of the second part one promissory note of even date herewith by which they promise to pay to the said John H. Pinnell or order for value received Thirty two thousand and nine hundred and twenty and 15/100 Dollars due October 30th, 1902, with interest from date to maturity at the rate of eight per cent. per annum payable annually as evidenced by note of even date herewith, both principal and interest notes are payable at Boatmens Bank at St. Louis, Missouri, and bears interest from date until paid at the rate of eight per cent. per annum, payable annually. Now, if the said D. G. Fritzlen and Edna P. Fritzlen shall well and truly pay or cause to be paid the sum of money in said note mentioned with the interest thereon according to the tenor and effect of said note then these presents shall be null and void. But if said sum of money, or either of them, or any part thereof or any interest thereon be not paid when the same become due and payable, or if the taxes and assessments of every nature which are or may be assessed against said land and appurtenances, or either of them, or any part thereof are not paid at the time when the same are by law made due and payable, then in like manner the said note and the whole of said sum shall immediately become due and payable; and upon forfeiture of the mortgage, or in case of default in any of the payments herein provided for the party of the second part, his heirs, executors, admin-

istrators and assigns shall be entitled to a judgment for the
53 sum due upon said note and the additional sums paid by virtue of this mortgage and all costs and expenses of enforcing the same, as provided by law, and a decree for the sale of said premises in satisfaction of said judgment, foreclosing all rights and equities in and to said premises of the said party of the first part, their heirs and assigns and all persons claiming under them, at which sale appraisement of said property is hereby waived by said party of the first part. And all benefit of the homestead exemption and stay laws of the State of Kansas *are* hereby waived by the said party of the first part. And the said party of the first — shall and will at their own expense from the date of the execution of said mortgage until said note and interest, and all liens and charges by virtue hereof are fully paid off and discharged, keep the buildings erected and to be erected on said lands, insured, in some responsible insurance company duly authorized to do business in the State of Kansas to the amount of —— dollars for the benefit of said party of the second part or his assigns; and in default thereof said party of the second part may at his option effect said insurance in his own name and the premium or premiums, costs, charges and expenses for effecting the same shall be an additional lien on said mortgaged property, and may at his option, pay any taxes or statutory liens against said property, all of which sums with eight per cent. interest may be enforced and collected in the same amount as the principal debt hereby secured. And the said party of the first part do hereby covenant and agree that at the delivery hereof said D. G. Fritzlen and Edna P. Fritzlen the lawful owners of the premises above granted and seized of a good and indefeasable estate of inheritance therein, free and clear of all incumbrances, and that they will warrant and defend the same in the quiet and peaceable possession of said party of the second part, his heirs and assigns forever, against the lawful claims of persons whomsoever.

In Witness Whereof the said party of the first part have set their hands the day and year first above written.

D. G. FRITZLEN.
EDNA P. FRITZLEN.

Executed and delivered in presence of
DELIA C. STEVENSON.

STATE OF KANSAS, *County of Clark, ss:*

Be it remembered, That on this fifth day of December, A. D. 1901, before me the undersigned a Notary Public in and for said County and State, came D. G. Fritzlen and Edna P. Fritzlen, husband and wife, who are personally known to me to be the identical persons described in and who executed the foregoing mortgage, and duly acknowledged the execution of the same to be their voluntary act and deed.

In Testimony Whereof, I have hereunto subscribed my hand and affixed my official seal on the day and year above written.

[L. S.] M. G. STEVENSON,
Notary Public.

My Commission expires October 5-1903.

Mortgage.

From D. G. Fritzlen and Edna P. Fritzlen to Jno. H. Pinnell, Kansas City, Mo.

STATE OF KANSAS, *County of Clark, ss:*

Received for record on the 6" day of December, A. D. 1901, at 9:20 o'clock *A minutes* A. M. Recorded in Book 17 at page 591.

MANFRED BROWN,
Register of Deeds.

Fee, $6.80 Pd.

Filed May 14, 1904.
A. BAKER, *C. D. C.*

54 In the District Court of Clark County, Kansas.

1769.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and THE BOATMENS BANK, Defendants.

And now comes the defendants, D. G. and Edna P. Fritzlen, and show to the court as follows:

That on July 31, 1903, there was served on these defendants a certain restraining order issued in this cause by the Probate Judge of Clark County, Kansas, whereby these defendants and the Boatmen's Bank defendant herein, were restrained and enjoined from in any manner whatever disturbing the status of the personal property described in the petition herein and were further restrained and enjoined from removing any of said personal property out of the jurisdiction of this court.

These defendants further allege that on August 17, 1903 there was filed in this court and cause by the said bank a petition for the removal of this action to the circuit Court of the United States for the District of Kansas and therefore on August 12, 1903 said Boatmen's Bank commenced a suit in the Circuit Court of the United States for the District of Kansas against these defendants and the plaintiff herein for the pretended purpose of foreclosing mortgages alleged by said bank to constitute liens upon the real and personal property described in the petition herein and that on Oct. 12, 1903 said Boatmen's Bank pretended to commence in the Circuit Court of the United States for the District of Kansas a certain action at law against these defendants and the said Weldon to replevin the personal property described in said petition.

These defendants further show to the court that by due proceedings had in said Circuit Court of the United States in this cause, the said Circuit Court of the United States made an order on April 2, 1904 remanding this cause to this court and adjudicating that

said Circuit Court of the United States for the District of Kansas neither had then nor had it ever had jurisdiction of this cause.

These defendants further show to the court that in said
55 replevin action pretended to be commenced by the said Bank in October 1903, aided and abetted by *tis* agent, one G. M. Smith, and its attorney, James S. Botsford and O. G. Young, caused a writ of replevin to issue out of said Circuit Court of the United States to the marshal of said court, directing and commanding said marshall to seize said personal property which was at that time and which had theretofore been, during all of the times mentioned herein, in the possession of these defendants in Clark County, Kansas; that in pursuance of the directions and instructions of the said Boatmen's Bank and particularly of the said James S. Botsford and the said G. M. Smith, the said marshall of the said Circuit Court in the presence of and particularly instructed and aided by the said O. G. Young and one W. H. Lukens, who was then and there the agent of said Bank, on Oct. 13, 1903 seized the personal property and took and carried away the same out of the jurisdiction of this court and out of Clark County and forcibly deprived these defendants of their possession and control of said personal property; that afterward the said marshall of said Circuit Court duly turned over to the said Bank and particularly to its agent, G. M. Smith, and its attorney, O. G. Young, the said personal property, and said Bank, aided, abetted and encouraged so to do, by the said James S. Botsford, its attorney, the said O. G. Young its attorney, the said G. M. Smith, its agent, and the said W. H. Lukens, its agent, forcibly converted said personal property to its own use.

These defendants further allege and show to the court that all of the aforesaid doings and contempts by the said defendants, the Boatmen's Bank, were wilfully done by defendant with the full knowledge of the issuance of said *said* restraining order and long after due and proper service of the same had been made upon said Bank and its said attorneys and its said agents and long after said Bank had duly appeared in this cause and submitted itself to the jurisdiction *if* this court.

These defendants further allege and show to the court that R. J. Lackland was and is now during all of the times mentioned herein, the President of said Bank, and Wm. H. Thompson, the Cashier of said Bank; that said Lackland and said Thompson have been during all of said times in constant communication with the said James S. Botsford, the said G. M. Smith and the said O. G. Young
and have all of the time been fully informed and had actual
56 knowledge of the contents of said restraining order and of its purpose and effect and have wilfully disobeyed *and* commands of said order and have aided, encouraged, directed and instructed the wilful violation of said restraining order by seizing and carrying out of the jurisdiction of this court the said personal property.

These defendants further allege and show to the court that in consequence of the commission by the said Lackland, Thompson,

Botsford, Smith, Young and Lukens of the aforesaid contempts of this court and its restraining order, these defendants have been compelled to expend large sums of money in the preparation and defense of the rights possessed by them concerning said personal property and in litigating the questions arising therefrom; that the expenditures connected with said litigation amount to the sum of $3500.

These defendants further allege and show to the court that the value of said personal property so converted by said defendant, Bank, in violation of the terms of said restraining order and in contempt of this court was at the time of the issuance of said restraining order and at the time of said seizure the sum of about $25,000.

These defendants further allege and show to the court that on April 25, 1904 by the consideration of the Circuit Court of the United States for the District of Kansas and after full argument and a hearing, a certain order was entered in said replevin suit dismissing the same for want of jurisdiction commanding the officers of said court, having possession of any of said personal property to further restore the same to the jurisdiction of this court. A copy of said order is hereto attached, marked "Exhibit A" and made a part of this petition.

These defendants further show to the court and allege that on April 25, 1904 upon due proceedings had in said Circuit Court of the United States for the District of Kansas and after a hearing and due consideration and order was made and entered by said court in said foreclosure suit commenced in August, 1903 and heretofore mentioned, whereby said foreclosure suit was dismissed because of want of jurisdiction in said Circuit Court of the United States to entertain the same. A copy of which said last mentioned order is hereto attached, marked "Exhibit B" and made a part hereof. The premises considered, these defendants pray that an order issue out of this court directed to the Boatmen's Bank, defendant herein, R. J. Lackland, President of said Bank, Wm. H. Thompson, Cashier of said Bank, James S. Botsford, Attor-
57 ney for said Bank, O. G. Young, Attorney for said Bank, G. M. Smith Agent of said Bank, and W. H. Lukens, Agent of said Bank, that they and each of them be and appear before this honorable court on May 16, 1904 at the Court House of the District Court of Clark County, Kansas at Ashland in said county and state, at the hour of four o'clock in the afternoon of said day, to there and then show cause if any they have, why they and each of them should not be proceeded against as for a contempt of this court and to there and then show cause, if any they have, why an order of this court should not issue, directed to said defendant, Bank, and to each of the other persons named herein, why they should not make restitution and restore to these defendants all that they have lost by reason of the commission by them and each of them of the aforesaid contempts and why they should not place within the jurisdiction of this court the proceeds derived from the said presonal property if any there be, together with such further

and additional sum as in the judgment of this court may seem proper.

H. J. BONE,
HITE & NICHOLS,
Attorneys for Fritzlen & Fritzlen.

STATE OF KANSAS, *Clark County, ss:*

D. G. Fritzlen of lawful age, being first duly sworn, says that he has read the foregoing application and the statements ther-in contained are true to the best of his knowledge and belief.

D. G. FRITZLEN.

Subscribed and sworn to before me this 23rd day of May, A. D. 1904.

A. BAKER,
Clerk of the District Court.

Filed May 23, 1904.
A. BAKER, *C. D. C.*

58 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and BOATMEN'S BANK, Defendants.

Order.

And now on this May 23rd, 1904, this cause comes on to be heard upon the application of the defendants, Fritzlen and Fritzlen, for an order directing the Boatmen's Bank, defendant herein, to restore the personal property turned over to it in October, 1903, under a certain writ of replevin issued out of the Circuit Court of the United States for the District of Kansas sitting in the second division thereof, in an action then pending in said Court wherein the said Bank was plaintiff and the said Fritzlen and Fritzlen and the plaintiff herein were defendants; and thereupon the said Fritzlen and Fritzlen appear by their counsel H. J. Bone and D. R. Hite, and the said Bank did not appear by counsel or otherwise; and thereupon it is made to appear to the Court by the proof adduced that due and sufficient notice of the time and place of this hearing has been given to said Bank by the service personally upon its attorneys of record of a copy of the said application and that such service of notice was made prior to May 6th, 1904, and in sufficient time for said Bank to appear and defend against the granting of said application; and thereupon the said defendants Fritzlen and Fritzlen introduced evidence in support of the allegations contained in said application and upon due consideration, the court being fully advised in the premises, finds from said evidence as follows:

That on July 30th, 1903, by due proceedings before the Probate

Judge of Clark County, Kansas, the said Probate Judge duly issued a restraining order restraining the said Bank and the said Fritzlens from in any manner whatever interfering with certain personal property described in the petition herein and from removing or attempting to remove the same or any part thereof out of the jurisdiction of this court until the hearing of the application for a temporary injunction herein, and that said Bank and its attorneys prior to September 1st, 1903, had full knowledge of the issuance of said restraining order and of its contents; the Court further finds that

59 on October —, 1903, the said Boatmen's Bank commenced an action of replevin in the Circuit Court of the United States for the District of Kansas, sitting in the second division, against the said Fritzlen and Fritzlen and the said Weldon, plaintiff herein, to gain possession of a large part of said personal property and procured the issuance out of said Court in said action of a writ of replevin, that the Marshall of said Court duly executed said writ by seizing the said personal property and directed so to do by the agents and attorneys of the said Bank duly turned over to the said Bank all of said personal property so seized; the Court further finds that on April 25th, 1904, by due proceedings had in said United States Circuit Court the said replevin action was duly dismissed by said Court for want of jurisdiction because of the pendency of this action in this Court.

Now therefore it is by the Court ordered and adjudged that the said Boatmen's Bank restore said personal property to the custody and place from which it was taken, and if said personal property has been by said Boatmen's Bank sold or otherwise disposed of that within twenty days from this date the proceeds thereof without any deductions whatever be by said Bank turned over and paid to The Stockgrowers' National Bank of Ashland, Clark County, Kansas to be by said Stockgrowers' National Bank held subject to the further order of this Court.

Let this order be served upon said Boatmen's Bank by delivering to its attorneys of record or one of them a certified copy thereof and by the Clerk of this Court sending to the President of said Bank at St. Louis, Missouri, by registered mail a certified copy hereof.

E. H. MADISON, *Judge.*

Filed May 24", 1904.

A. BAKER, *C. D. C.*

60 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
v.
D. G. FRITZLEN, EDNA P. FRITZLEN, and BOATMEN'S BANK, Defendants.

Separate Answer of D. G. Fritzlen.

Now comes D. G. Fritzlen and for his answer herein, says:

I.

This defendant admits that at the time and place stated in the petition herein, this defendant and his co-defendant, Edna P. Fritzlen, (who was then as she is now this defendant's wife), executed to the plaintiff, W. H. Weldon, the mortgage set out in said petition, to secure a debt due originally from this defendant to one J. L. Allen, for $2500.00 but this defendant alleges that in the note for $3750.00 so executed to the said W. H. Weldon there is included an excessive amount of interest, larger than should be therein included, and therefore this defendant denies that he is indebted to the said plaintiff to the amount alleged in said petition.

This defendant for his cause of action against his co-defendant the Boatmens Bank, says:

1. That prior to 1898 and since that time this defendant has been engaged in the business of buying cattle and other livestock, preparing them for market and selling the same; that during the year 1898 this defendant conducted a considerable portion of his business through a certain partnership doing business under the firm name of Elmore & Cooper, and composed of William Elmore and Frank Cooper; that the business of the said partnership was during said year, and previously, transacted at the Kansas City Stock Yards, a public Stock Market situated at the confluence of the Missouri and Kansas rivers, and partly in the State of Kansas and partly in the State of Missouri; that the occupation of said firm at said times and place was the purchase and sale of livestock for others on commission as livestock commission cerchants. That during the course of his transactions with the said partnership firm of Elmore & Cooper this defendant was charged as a pre-

61 tended commission for the purchase and sale of live stock for his account a large sum of money, to-wit, more than $3000.00; that in making the said commission charges the said partnership invariably exacted of this defendant the sum of fifty cents per head or twelve dollars per car-load of cattle for buying and the same rate for selling cattle; that said rates of commission were exacted by said partnership in furtherance of and for the purpose of carrying out the terms and conditions of a certain agreement entered into between the said Elmore & Cooper and about two hundred other persons engaged in the same business of buying and selling livestock at said yards on commission. That the parties to

said agreement long prior to 1898 combined and confederated for the purpose of monopolizing the business of buying and selling livestock at said yards, under the name and style of the Kansas City Live Stock Exchange. That said Exchange is and was during all the times stated herein, an unincorporated association having its principal office and place of business in the State of Missouri, in a building known as the Exchange building. That the parties to said agreement and conspiracy duly adopted certain rules, regulations and by-laws for the guidance and control of their business dealings with the public; that the purpose and effect of said rules, regulation and by-laws was and is to place the absolute control of the business of buying and selling livestock at said yards, on commission for others, in the hands of members of said Exchange and to effectively restrain all other persons from engaging in such business at such place. That said rules, regulation and by-laws provide, among other things that no member of such Exchange should charge less than fifty cents per head or twelve dollars per car for buying cattle for another and the same rate for selling cattle for another; that if any member violates such rule he should be disciplined by the imposition of a large pecuniary fine and unless such fine was paid, should be suspended or expelled from membership, and all other members were and are denied the right to transact business with any such suspended or expelled member; that said Exchange, as such, transacted no business directly but was organized for the purpose of and did control the manner in which the business at said yards of buying and selling livestock for others on commission was conducted. This defendant alleges that the said stock yards is the most available market for live stock for
62 the Kansas cattle men and that practically all of the stock raised or fed in the State of Kansas is and was marketed at said yards; that about ninety per cent. of all of the cattle marketed at said yards passed through the hands of said members of said Exchange and paid tribute to them at rates which were fixed and controlled by said combination and agreement.

This defendant further al-eges that by subscribing to and carrying out the provisions of the said rules, regulation and by-laws said members of said Exchange, including said Elmore & Cooper, constitute a combination and illegal trust within the meaning of the laws of the State of Kansas relating to contracts and agreements in restraint of trade. That while the said Elmore & Cooper never at any time bought cattle for this defendant's account, yet obeying said rules, regulation and by-laws the said partnership duly charged this defendant with commission therefor under the regulations of said Exchange, that where a member thereof loaned money to a customer for buying cattle elsewhere than at said yards commission should be charged the same as though said cattle were actually bought at said yards.

That an indebtedness of this defendant to said Elmore & Cooper to the amount of about $19000.00 existed in 1898 represented by a promissory note executed to said partnership by this defendant; that included in said note as a part of the consideration therefor was said

sum of about $3000.00 charged as commissions; that said commission charged was and is allegal and its collection prohibited by the laws of the State of Kansas; that said note was wholly illegal and uncollectible by said Elmore & Cooper from this defendant; That in December 1898 the said Elmore & Cooper failed and were succeeded by The Elmore & Cooper Live Stock Commission Company a Missouri Corporation; that said Elmore & Cooper Commission Company duly became a member of said Exchange and a party to said illegal combination in restraint of trade, and exacted from this defendant another commission as required by the rules of said Exchange; that in the year 1900 this defendant executed to said Elmore & Cooper Live Stock Commission Company his promissory note for about $20,000.00, a large part of the consideration for which was the aforesaid commission charges exacted by said corporation and said partnership. That said note was not
63 negotiable. That said Boatmens Bank acquired said last mentioned note from said Elmore & Cooper Live Stock Commission Company by assignement thereof to it. That afterwards the defendant Bank procured this defendant in circumstances hereinafter related to execute the promissory note mentioned in the answer of said Bank herein; that a part of the consideration for said last mentioned note was the note executed to said Elmore & Cooper Live Stock Commission Company and included said illegal commissions exacted as aforesaid.

III.

The defendant further alleges that prior to and since the year 1898 the said Bank has been a corporation existing under the laws of the State of Missouri, having its principal office in the city of St. Louis; that during the year 1898 the said co-defendant employed one John H. Pinnell as its agent at the said Stock Yards and to procure loans on live stock and other property belonging to citizens of the State of Kansas and situated in said State; that said John H. Pinnell was duly authorized to and did represent said co-defendant in all matters relating to the transaction of its said business in the State of Kansas. That beginning with the year 1898 and continuously since then the said Bank through said Pinnell and his successor has transacted and done a large amount of business in the State of Kansas amounting in volume to several hundred thousand dollars and consisting of a large number of independent transactions. That the said Bank instructed the said Pinnell to and he did, for the transaction of its business, open and equip an office, which said office and agency has been ever since maintained in the State of Kansas. That for the fraudulent purpose of evading the laws of the State of Kansas relating to foreign corporations the said Bank transacted its Kansas business in the name of the said Pinnell or his successor in charge of said agency, all the time meaning and intending to hide the fact that it was doing business in said State in violation of law and to avoid the process of the courts of said State. That said Bank has never complied with the laws of the State of Kansas relating to foreign corporations in any particular whatever but has con-

tinuously since 1898 defied the said laws and neglected and refused to comply therewith. That said Bank has never received nor
64 been entitled to receive a certificate from the Secretary of the Charter Board of the State of Kansas, that it was authorized to do business in Kansas, nor in any other manner qualified or attempted to qualify itself to do business in said State.

IV.

That the Note and mortgage set out in the answer of the said Bank were executed by this defendant in the following circumstances to-wit. Prior to November 30, 1901 the said Bank by assignment from the said Elmore & Cooper Live Stock Commission Company became the holder of the note of this defendant executed to the said Commission Company for the consideration mentioned in paragraph two of this answer; that said Commission Company prior to the execution of said note of November 30, 1901 failed, and said defendant Bank thereupon sent its said agent, John H. Pinnell to the home of this defendant in Clark County, Kansas, to arrange for renewal of said then outstanding note; that accordingly the said Pinnell, on or about November 30, 1901, visited this defendant at his ranch in said County and procured this defendant to execute said note and mortgage in renewal of said original note to said Elmore & Cooper Live Stock Commission Company; that said original note was secured by a chattle mortgage only; that at said time and place the said Pinnell on behalf of said defendant Bank agreed that if this defendant would give this defendant a real estate mortgage in addition to renewing said chattel mortgage which secured tne original note, the said Bank would furnish to this defendant whatever feed would be necessary to safely and properly care for said live stock described in said chattel mortgage, that the cost of such feed would be by said Bank charged to this defendant and the payment therefor secured by such real estate mortgage; that in addition to furnishing such necessary feed that said defendant Bank would pay to this defendant thirty dollars each month until said live stock were ready for market and marketed. That the expenditure by said defendant Bank thus to be made constituted the sole consideration for the execution by this defendant of said real estate mortgage, the personal property described in said chattel mortgage and then on said ranch being then abundantly sufficient in value to satisfy the full amount of said note if the same was valid, which this defendant denies. That afterwards said defendant Bank furnishd upon the demand of this defendant
65 the feed necessary to care for said live stock and made said monthly payments and charged the same to the account of this defendant and the expenditures of the said Bank in that respect up to some time in November 1902 have been duly paid to said Bank by this defendant. That in the Autumn of 1902 it was duly arranged bytween one G. M. Smith (Who had succeeded the said Pinnell as the Kansas managging agent of said Bank) in pursuance of said arrangement previously made with the said Pinnell, that the said live stock should be wintered on said ranch and that said Bank would ship the necessary feed to care for the same during the winter of

1902-3; and this defendant relying upon said promise kept said live stock on said ranch. That during the month of January 1903 this defendant demanded feed for said cattle and the same was again promised but said co-defendant failed and neglected to send the same. That thereafter during said winter more than 500 head of this defendant's cattle starved to death and were wholly lost to this defendant. That said Bank was duly notified of the necessity of said feed and so misled this defendant by its repeated promises through the said Pinnell and the said Smith with reference thereto that he constantly expecting said feed did not procure the same from other sources. This defendant alleges that if the necessary feed had been furnished to this defendant at his ranch at the time requested and required under the terms of the agreement between this defendant and the said Bank the said cattle would have gone through said winter with but trifling loss, and that said loss was due to the failure, neglect and refusal by said Bank to faithfully perform its said agreement.

That the value of said personal property after the said winter was $20000.00 less than the value thereof would have been had said live stock been properly fed through said winter. That said 500 cattle that starved to death were worth not less than $15000.00 and the remainder of the herd were so greatly reduced as to make them unmarketable and decreased in value to the amount of not less than $5000.00.

This defendant alleges that at the time of the execution of said mortgage the said Pinnell was fully acquainted by this defendant with the financial resources of this defendant and informed that the principal motive of this defendant in giving the excess security of the real estate mortgage was to insure an abundant supply of feed
66 for the large herd of live stock covered by the chattel mortgage and was further informed that the placing of record of the real estate mortgage would operate to deprive this defendant of credit in the purchase of feed and this defendant would rely upon the said Bank's promptness and faithfulness in furnishing said feed as the same was required.

This defendant alleges that by reason of the failure of the said Bank to perform the said contract he has been demaged in the sum of $200000 as aforesaid.

V.

This defendant further alleges that in July 1903 this defendant was in the peaceable possession on his ranch in Clark County of the large number of cattle and horses consisting of the survivors of the herd with which this defendant started in the previous winter and which are described in said chattel mortgage set out as Exhibit "B" in said Bank's answer. That said herd were carefully and skillfully attended to by this defendant and provided with abundant pasturage etc. That in the month of July 1903, by the consideration of this Court an order was made in this cause that neither this defendant nor said Bank should in any manner interfere — said herd of live stock and other personal property and restraining the said Bank from removing or attempting to remove the same from Clark County,

Kansas; that notwithstanding said order and without any lawful right so to do the said Bank on or about October 13, 1903, with full notice and knowledge of said order seized and converted to its own use said herd of live stock consisting of 1385 head of cattle and 171 head of horses and 4 wagons, 6 sets of harness, 2 McCormack Harvesters and Binders, 1 Deering Binder and Harvester, 1 Havana Disk Wheat Drill, 1 McCormack Mower, 2 Riding Cultivators, and 1 Riding Lister. That at the time said personal property was so seized by said Bank and converted to its own use it was of the value of $25000.00 but said live stock was not yet ready for market.

Wherefore this defendant prays that he have the following relief:

1. That the amount of the debt of this defendant to the plaintiff be ascertained and this defendant be given such time to pay the same prior to the sale of any of his property as may be consistent with justice.

67 2. That the note and chattel mortgage of November 30, 1901, set out in the answer herein of the said Bank as Exhibits "A" and "B," be adjudged to be illegal and void.

3. That an account be taken and stated between this defendant and said Bank; that in taking said account the said Bank be charged with the loss and damage sustained by this defendant growing out of the failure of said Bank to comply with its agreement concerning said feed for said live stock; and, with all, payments made by this defendant; that this defendant be charged with any proper disbursements (not included in said illegal note), made by said Bank for the purchase of feed and for monthly payments and that this defendant have judgment against said Bank for any balance thereupon, found to be due to him. That upon the statement of said account it be decreed by this Court that said real estate mortgage is completely satisfied, paid and discharged and that the same does not constitute a lien upon said real estate or any part of the same.

4. That unless said Bank shall have deposited subject to the order of this Court the full value of the live stock and other property seized and converted by it in October 1903, that this defendant have judgment against said Bank for the value of said personal property and interest thereon from October 13, 1903.

5. That this defendant have such other and further relief as in equity he may be entitled to have.

H. J. BONE,
D. R. HITE,
Attorneys for Defendant D. G. Fritzlen.

Filed May 26" 1904.
A. BAKER, *C. D. C.*

68 In the District Court of Clark County, State of Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and BOATSMENS BANK, Defendants.

Reply.

For his reply to the answer of the defendant, the Boatmens Bank, plaintiff says:

First. That at the time of the pretended execution of the mortgage mentioned in said answer, the John H. Pinnell mentioned therein was the agent of the said defendant and said mortgages were in fact executed to said Bank, the name of said Pinnell having been inserted on said note and mortgage as payee and mortgagee for the sole purpose of fraudulently evading the laws of the State of Kansas relating to the transaction of business in said State by foreign corporations.

Second. That long prior to the execution of said note and mortgage the said defendant established an agency and office in the State of Kansas for the purpose of, and it did engage in the transaction through said agency and office, of a large amount of business in said State. That said John H. Pinnell was, about the year 1898, duly appointed as the general agent of the said Bank, and said bank at that time established and has ever since maintained an office in said State and has constantly transacted business therein all of the time, pretending that such business was done by said agent on his own account. That said bank has never complied with any of the laws of the said State relating to foreign corporations, and was not at the time said note and mortgage were executed had, nor had it since acquired, right, power or authority to do business in Kansas, nor to acquire nor enforce liens on property situated in said State.

Third. That the said Bank is not an innocent holder for value received of said note; that said note set out in said answer is a renewal of a note given to Elmore & Cooper, which was not a negotiable promissory note and was transfer-ed to the said bank by assignment and not by endorsement. This plaintiff pleads in defense of said note and mortgage that the pretended causes of action represented thereby grow out of a transaction in the
69 State of Kansas by a member of an illegal combination in restraint of trade, to-wit: Said note was given as a renewal of an original note given by the Defendant D. G. Fritzlen to Elmore & Cooper, to secure the payment of commissions charged the said Fritzlen for the pretended purchase and sale of cattle at the Kansas City Stock Yards; that at the time said charges for commissions were made and since then, said Elmore & Cooper were members of an unincorporated Association known as the Kansas City Live Stock Exchange and having its principal office in Missouri, the purpose

of which was, and is, to monopolize the business at said yards of buying and selling live stock on commission. That by the rules of said Exchange rates of commission to be charged by its members were in violation of law, fixed by said illegal combination, and the said Elmore & Cooper in charging said commissions to the said Fritzlen carried out and conformed to the said rules and made said charges in violation of the laws of Kansas. That said bank at the time it acquired said original note well knew that the same was given to secure the payment of said illegal commissions and knew that the said Elmore & Cooper were members and a part of said combination, and well knew that said original note was illegal and void and prohibited by law.

F. C. PRICE,
Att'y for Pl't'ff.

Filed May 26, 1904.
A. BAKER, *C. D. C.*

70 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and BOATSMENS BANK, Defendants.

Again comes said Boatmens Bank and moves the court or judge to grant an extension of time within which to make and serve a case for the Supreme Court on the order in said cause made May 23, 1904 for the reason that such extended time is necessary for the making and serving of a case made and because the same cannot be done within the ten days provided by the act relating to case made approved March 13, 1903. Page 583 Session Laws of Kansas of 1903.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys of Boatmens Bank.

Filed June 3" 1904.
A. BAKER, *C. D. C.*

71 In the District Court of Clark County, Kansas.

No. 1769.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and BOATMENS BANK, Defendants.

Order.

And now on this May 31, 1904 on motion of said Boatmens Bank it is ordered that said Bank be and the same is hereby given thirty

days within which to make and serve on the other of said parties a case made for the Supreme Court for review of the order made in said cause on May 23, 1904. This order is made because said additional time is necessary for the making and serving of such case made.

E. H. MADISON, *Judge.*

Filed June 3, 1904.
A. BAKER, *C. D. C.*

72 In the District Court of Clark County, Kansas.

No. 1769.

W. H. WELDON, Plaintiff,
vs.
D. G. and EDNA P. FRITZLEN, and BOATMENS BANK, Defendants.

Motion.

And now at this day again comes said defendant, Boatmens Bank, and moves the Court to set aside and hold for naught the order made in said cause on May 23rd, 1904, requiring this defendant, Boatmens Bank, to restore personal property to the custody and place from which it was taken, or to make deposit in the Stock Growers National Bank of Ashland, Clark County, Kansas, and in support of this motion to set aside said order and as reasons and grounds therefor said Boatmens Bank says:

(1) That said order was and is null and void and for want of power in this Court to make the same.

(2) That on the record in this cause said order was and is null and void.

(3) The restraining order issued by the Probate Court of Clark County, Kansas, mentioned in said order was without force and effect and was null and void.

(4) Said restraining order has been annulled and cancelled by an order of the United States Circuit Court for the District of Kansas in the Second Division thereof while in possession of the cause in which said restraining order was made.

(5) Said order of May 23rd, 1904, was made without any notice to said defendant, Boatmens Bank, that application for said order would be presented to said District Court on said May 23rd, 1904, or that application for said order would be presented to said Court at any other time.

(6) Said replevin action mentioned in said order is now pending in the U. S. Circuit Court of Appeals for the Eighth U. S. Circuit on a writ of error issued in said replevin action removing said replevin action and said judgment of dismissal from said U. S. Circuit Court for the District of Kansas sitting in the Second Division thereof to said U. S. Circuit Court of Appeals, and also on citations duly issued and served on said Welden and on said D. G. and Edna P. Fritzlen, all of which will appear by certified copies of said writ of error, citations and service thereof herewith filed.

(7) Said District Court had no authority or power on the motion or application of said defendants Fritzlen and Fritzlen to make said order or any other order in this cause.

(8) Said defendants D. G. and Edna P. Fritzlen do not occupy a status or position in this cause which authorizes them to call upon this Court to make any orders in this cause, or which authorized this Court to make any order in this cause as against this defendant Bank in said cause.

73 (9) Said restraining order in connection with this suit having been procured and brought by plaintiff Welden and the defendants D. G. and Edna P. Fritzlen being in default in this cause for want of either an answer or demurrer to the petition herein, said Fritzlens have no right or authority to call upon this Court to take any action herein either as against the plaintiff or defendant Bank.

(10) Said Bank is not answerable to said District Court in this cause for bringing its replevin action under the Constitution and Laws of the United States in the U. S. Circuit — for the District of Kansas, and whatever remedy said Fritzlens have for the bringing of said suit should be pursued on the replevin bond given by said Bank in said replevin action.

(11) Said Fritzlens have no right or authority to call upon this Court to enforce an injunction which issued at the instance of the plaintiff herein against the Fritzlens.

(12) No temporary restraining order or injunction has been granted in this cause at the instance of defendant- Fritzlen and Fritzlen against this defendant Bank upon any answer or counter-claim filed herein by said defendants Fritzlen and Fritzlen.

(13) The petition in this cause does not state facts sufficient to constitute a cause of action.

(14) Said order is so vague, uncertain and indefinite as to be void upon its face.

Wherefore, and for divers other reasons and causes said defendant Bank moves the Court to adjudge said order of May 23rd, 1904, to be null and void and to vacate the same.

BOTSFORD, DEATHERAGE & YOUNG,
Atorneys for Boatmens Bank.

STATE OF MISSOURI, *City of St. Louis, ss:*

R. J. Lackland being duly sworn, on his oath, says that he is President of said Boatmens Bank; that he has read the foregoing motion, and that the matters stated therein are true.

R. J. LACKLAND.

Subscribed and sworn to before me this 1st day of June, 1904.

[SEAL.] HARRY C. BARKER,
Notary Public.

My commission will expire August 21st, 1906.

Filed June 6, 1904.
A. BAKER, *C. D. C.*

74

"EXHIBIT B."

(*Writ of Error.*)

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Second Division of the Judicial District of Kansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the March Term, 1904, thereof, between Boatmens Bank of St. Louis, Missouri, a corporation, Plaintiff, *vs.* D. G. Fritzlen, Edna P. Fritzlen and W. H. Weldon, Defendants, a manifest error hath happened, to the great damage of the said Plaintiff, Boatmens Bank of St. Louis, Missouri, a corporation, as by its complaint appears.

We being willing that error, if any hath been, would be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 15" day of July, 1904, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16" day of May in the year of our Lord one thousand nine hundred and four.

Issued at office in the City of Wichita with the seal of the Circuit Court of the United States for the Second Division of the Judicial District of Kansas, dated as aforesaid.

75 [SEAL.]

GEO. F. SHARITT,
Clerk Circuit Court United States, Second Division of the Judicial District of Kansas,
By J. F. SHEARMAN,
Deputy Clerk.

Allowed by
JOHN C. POLLOCK, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA,
Second Division of the Judicial District of Kansas, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth

Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Circuit Court, at office in the city of Wichita, this 21st day of May, A. D. 1904.

GEO. F. SHARITT,
Clerk of said Court,

[SEAL.] By J. F. SHEARMAN,
Deputy Clerk.

(Endorsed:) No. 1013. United States Circuit Court, Second Division of the Judicial District of Kansas. Boatmens Bank of St. Louis, *vs.* D. G. Fritzlen, *et al.* Writ of Error to the Circuit Court of the United States for the Second Division of the Judicial District of Kansas. Filed 16th day of May, 1904, Geo. F. Sharitt Clerk. By J. F. Shearman, D. C.

(Original Citation.)

The United States of America to D. G. Fritzlen and Edna P. Fritzlen, defendants, and H. J. Bone and Hite & Nichols, their attorneys, and to W. H. Weldon, defendant, and Francis C. Price, his attorney, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in
76 the Clerk's office of the Circuit Court of the United States for the Second Division of the Judicial District of Kansas, wherein Boatmens Bank of St. Louis, Missouri, a corporation, is Plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the Circuit Court of the United States for the District of Kansas, this 16th day of May in the year of our Lord one thousand nine hundred and four.

JOHN C. POLLOCK,
United States District Judge,
for the District of Kansas.

Service of the foregoing Citation accepted this May 16, 1904.

HITE & NICHOLS AND H. J. BONE,
Attorneys for D. G. & Edna P. Fritzlen.

(Endorsed:) No. 1013. United States Circuit Court, Second Division of the Judicial District of Kansas. Boatmens Bank of St. Louis, *vs.* D. G. Fritzlen, *et al.* Citation. Filed May 20th, 1904. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

(Copy of Citation.)

The United States of America to D. G. Fritzlen and Edna P. Fritzlen, defendants, and H. J. Bone and Hite & Nichols, their attorneys and to W. H. Weldon, defendant, and Francis C. Price, his attorney, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Second Division of the Judicial District of Kansas, wherein Boatmens Bank of St. Louis, Missouri, a corporation is Plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

77 Witness, the Honorable John C. Pollock, Judge of the Circuit Court of the United States for the District of Kansas, this 16" day of May in the year of our Lord one thousand nine hundred and four.

JOHN C. POLLOCK,
United States District Judge,
for the District of Kansas.

Service of the above citation accepted this May 17, 1904.

FRANCIS C. PRICE,
Attorney for W. H. Weldon, Defendant.

UNITED STATES OF AMERICA,
District of Kansas, Second Division, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the Citation in No. 1013—Boatmens Bank of St. Louis, Mo. *vs.* D. G. Fritzlen, *et al.*

In witness whereof, I have hereunto set me hand and affixed the seal of said Court, at my office in Wichita, in said District, this 16" day of May, A. D. 1904.

[SEAL.] GEO. F. SHARITT, *Clerk.*

(Endorsed:) Copy. No. 1013. United States Circuit Court, Second Division of the Judicial District of Kansas. Boatmens Bank of St. Louis *vs.* D. G. Fritzlen, *et al.* Citation. Filed May 20th, 1904. Geo. F. Sharitt, Clerk. By J. F. Shearman, D. C.

78 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing four pages contain full, true and complete copies of the Writ of Error and Clerk's return thereon, Citation with acceptance of service

thereof by Attorneys for D. G. and Edna P. Fritzlen, and Certified Copy of Citation with acceptance of service by Attorney for W. H. Weldon, as full, true and complete as the same appear in the transcript of record on writ of error to the Circuit Court of the United States for the District of Kansas in the case of Boatmens Bank of St. Louis, Missouri, a corporation, Plaintiff in Error, *vs.* D. G. Fritzlen, *et al.*, No. 2081, on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this first day of June, A. D. 1904.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Filed June 6" 1904.
A. BAKER, *C. D. C.*

79 In the District Court of Clark County, State of Kansas.

W. H. WELDEN, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and BOATMENS BANK OF ST. LOUIS, Defendants.

Petition of Defendant, Boatmens Bank, for the Removal of this Cause to the U. S. Circuit Court for the District of Kansas Sitting in the Second Division Thereof.

To said Court:

Your petitioner, the Boatmens Bank of St. Louis, one of the defendants in the above entitled cause, respectfully shows that the matter and amounts in dispute in this suit exceeds, exclusive of interest and costs, the sum and value of $2,000 as will appear by the pleadings in this cause; that the property described in plaintiffs petition herein and mentioned in the other pleadings, is worth about $30,000 and much in excess of $20,000 and that the prior mortgages held on said property by said Boatmens Bank were given and are held by said Boatmens Bank to secure an indebtedness to said Bank from said D. G. Fritzlen and Edna P. Fritzlen in the sum of $32,920.15 with interest at 8% per annum from November 30th, 1901, and were given on that day.

Your petitioners further shows that this defendant is a corporation created and existing under the laws of the state of Missouri, and has been such a corporation more than five years last past, and during all that time had and still has its principal office at St. Louis in said State of Missouri, and that before, at and ever since and for a long time prior to the bringing of this suit said Boatmens Bank was and still is a corporation duly created under the laws of and a citizen of the State of Missouri engaged in the banking business in said City of St. Louis, Missouri.

Your petitioner further avers and shows that for the last five years said plaintiff W. H. Welden, and said defendants D. G. Fritzlen and Edna P. Fritzlen were and had been at the time of bringing this suit were and ever since have been and still are citizens of the State of Kansas and residents of the county of Clark in said State of Kansas.

80 Your petitioner further shows and avers that by the separate answer of defendant D. G. Fritzlen herein filed in this Court on May 26th, 1904, said defendant D. G. Fritzlen from and after paragraph one of said separate answer and including paragraph two of said separate answer, and therefrom to the conclusion of said answer, seeks to maintain in this cause an original cause of action against this defendant Boatmens Bank, as from said answer will fully appear; that by paragraphs four and five of said separate answer to the prayer of said separate answer said defendant D. G. Fritzlen seeks to maintain and set up in said answer against this defendant, Boatmens Bank, two separate counter-claims; the counter-claim contained in paragraph four being for the sum of $20,000 and the counter-claim contained in paragraph five being for the sum of $25,000, and your petitioner, said Boatmens Bank, shows and avers that each of the controversies between said defendant D. G. Fritzlen and said defendant Boatmens Bank growing out of the matters set up in said counter-claims are separable controversies wholly between said defendant D. G. Fritzlen and said Boatmens Bank, and that said separable controversies of said counter-claims can be determined if cognizable in this action fully as between said D. G. Fritzlen and said Boatmens Bank; that said plaintiff Welden is not in any wise interested in said counter-claims, or either of them.

Wherefore, said Boatmens Bank prays the Court to make an order removing this cause to the U. S. Circuit Court for the District of Kansas sitting in the Second Division therof.

And for a still further and additional ground for the removal of this cause your petitioner, the said Boatmens Bank, shows to the Court and avers that by paragraphs numbered 2 and 3 in said separate answer of defendant D. G. Fritzlen in which said defendant Fritzlen sets out an alleged cause of action against this defendant Boatmens Bank, the same matters are set up by said defendant D. G. Fritzlen as grounds of the alleged invalidity of the note and mortgages of this defendant, Boatmens Bank, as are relied upon and pleaded in the reply filed by said plaintiff Welden herein on May 26th, 1904, as by reference to said answer of defendant Fritzlen and said reply of plaintiff will fully appear; that in paragraphs numbered two and three of defendant D. G. Fritzlen's answer, he and said plaintiff by said reply maintain the same con-

81 troversy in this cause as to the alleged invalidity of the note and mortgage of this defendant Boatmens Bank as appears from said separate answer of defendant Fritzlen and said reply of plaintiff Welden, and the defendants Fritzlen and plaintiff are on one side of all the controversies involved in the pleadings herein by said separate answer and by the said reply of the plaintiff, and that this defendant Boatmens Bank is on the other side of said con-

troversy, and that this suit in its entirety, as shown by said separate answer of said Fritzlen and said reply of plaintiff, involves controversies between citizens of different states in relation to which controversies the plaintiff Welden and defendants Fritzlen and Fritzlen citizens of the State of Kansas are on one side and this defendant, Boatmens Bank, a citizen of the State of Missouri, is on the other side.

This defendant Boatmens Bank further shows and avers that this defendant had no knowledge either by its officers or attorneys of the filing of said separate answer of defendant D. G. Fritzlen and said reply of plaintiff on May 26th, 1904, until Saturday June 4th, 1904, on which last day the *the* attorneys of said Bank were furnished with copies of said answer and reply by the Clerk of the District Court, and that the time within which this defendant, Boatmens Bank, is required to plead or answer to said separate answer has not yet expired according to the Statutes or the Rules of Practice of the State of Kansas, and that neither said Boatmens Bank or its attorneys herein have been served with said separate answer of defendant D. G. Fritzlen, or required by an order of Court to plead, answer or demur to said separate answer, and that said separate answer is in all that is contained therein, after paragraph one, a new suit on the part of D. G. Fritzlen against this defendant Boatmens Bank.

Said defendant Boatmens Bank further avers and shows to the Court that this suit in its inception and in the conducting thereof was and has been fraudulently instituted and maintained by plaintiff Welden and defendants Fritzlen for the purpose of fraudulently preventing this defendant Boatmens Bank from removing this action to the U. S. Circuit Court as prayed for in this petition: that said Boatmens Bank has no interest whatever in the mortgages and note held by plaintiff and made to him by defendant Fritzlen and men-
82 tioned in plaintiff's petition in this cause, and that as appears from said separate answer of defendant D. G. Fritzlen, there was and has been and is now no controversy between plaintiff and defendant Fritzlen as to the said mortgages and note of plaintiff and the foreclosure thereof, and said defendant Boatmens Bank further charges and avers that this suit was brought in the manner and form of the bringing of the same not for the purpose of adjudicating or settling any controversy between plaintiff Welden and the defendants Fritzlen, but for the purpose, fraudulently, of enabling the defendant Fritzlens to maintain their said suit set up in their said separate answer herein against this defendant Boatmens Bank, and to litigate the same in the State Court, and to prevent the trial of said controversy between said Fritzlens and this defendant, Boatmens Bank, in the United States Circuit Court.

The defendant Boatmens Bank further avers and states that the defendant Fritzlens herein were and have been in default from the time of the institution of this suit until the filing of said separate answer herein by and with the consent, connivance and collusion of the plaintiff herein, and that by agreement between plaintiff and defendant Fritzlens the said separate answer of D. G. Fritzlen was withheld and not filed until after the remanding of this cause on the first petition filed by this petitioner so as to prevent its being

made to appear while this action was pending on said former petition in the United States Court that this suit was maintained for the fraudulent purposes aforesaid, and that the controversies herein were wholly between citizens of different States.

The premises considered, said defendant Boatmens Bank prays the Court to take no further steps in this cause, and tenders herewith a good and sufficient bond for the purposes of removal hereby prayed, and said petitioner, Boatmens Bank prays that this cause may be removed from said District Court of Clark County, Kansas, to said United States Circuit Court for the District of Kansas sitting in the Second Division thereof.

BOATMENS BANK OF ST. LOUIS, MISSOURI,
By BOSTFORD, DEATHERAGE & YOUNG,
Its Attorneys.

83. UNITED STATES OF AMERICA,
Eastern District of Missouri, City of St. Louis, ss:

Rufus J. Lackland being duly sworn on his oath, states that for some three years last past he has been and still is President of said Boatmens Bank of St. Louis, Missouri; that he has read the above and foregoing petition for removal of this cause to the Circuit Court of the United States for the District of Kansas, and that the matters stated and charged in said petition are true.

RUFUS J. LACKLAND.

____ ____,
Notary Public, City of St. Louis.

Subscribed and sworn to before me this 8th day of June, A. D. 1904.

My commission will expire August 21, 1906.

[SEAL.] HARRY C. BARKER,
Notary Public.

Filed June 10, 1904.
A. BAKER, *C. D. C.*

84 In the District Court of Clark County, Kansas.

No. 1769.

W. H. WELDEN, Plaintiff,
vs.
D. G. and EDNA P. FRITZLEN and BOATMENS BANK, Defendants.

Demurrer.

And now at this day comes said defendant Boatmens Bank and demurs to the reply herein of the plaintiff filed May 26th, 1904,

and in support of this demurrer said defendant Boatmens Bank assigns the following grounds and reasons.

(1) The matters set up in the first paragraph of said reply do not constitute any answer in law or sufficient grounds upon which to adjudge that the mortgages of defendant Boatmens Bank pleaded in its answer herein are invalid or void, and said matters contained in said paragraph of said reply do not constitute any reply or any sufficient matter of reply to the answer of defendant Boatmens Bank herein.

(2) The matters contained and set up in said first paragraph of said reply do not, in law, prevent said Boatmens Bank from defending this action, or from obtaining the judgment of the Court herein upholding the mortgages of said defendant Boatmens Bank as prior liens to the mortgages held by the plaintiff.

(3) The matters pleaded and contained in said second paragraph of plaintiff's reply do not, in law, prevent or take away the right of defendant Boatmens Bank herein to defend this action on its prior mortgages pleaded in its answers herein against the cause of action pleaded in plaintiff's petition.

(4) The matters contained in and set up in said second paragraph of said reply of plaintiff do not constitute, in law, any grounds of reply in favor of plaintiff against defendant Boatmens Bank, or any grounds upon which said plaintiff is entitled to the judgment of the Court herein that the mortgages of said Boatmens Bank herein are invalid or void.

85 (5) The matters set up in the third paragraph of said reply do not constitute any grounds of reply or defense on the part of plaintiff to the mortgages pleaded by said defendant Boatmens Bank in its answer herein, and on the matters pleaded and contained in said third and last paragraph of plaintiff's reply, said defendant Boatmens Bank is entitled to the judgment of the Court upholding and maintaining its mortgages pleaded in its answer herein as valid prior securities to those held by the plaintiff.

(6) On the matters pleaded in said third paragraph of said reply the mortgages of defendant Boatmens Bank pleaded in its answer herein were and are valid mortgages and securities under and according to the laws of the State of Kansas, and that no acts of omission or commission on the part of Elmore & Cooper or Elmore & Cooper Live Stock Commission Company or the Kansas City Live Stock Exchange could or did avoid the note and mortgages given by the defendant D. G. Fritzlen to said Boatmens Bank pleaded in its answer herein.

(7) On the matters pleaded and contained in said third paragraph said defendant Boatmens Bank is entitled to defend this action and to have the judgment of the Court sustaining its mortgages set up in its answers herein.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Boatmens Bank.

Filed June 18", 1904.
A. BAKER, *Clerk.*

86 In the District Court of Clark County, Kansas.

No. 1769.

W. H. WELDEN, Plaintiff,
vs.
D. G. FRITZLEN, EDAN P. FRITZLEN, and BOATMENS BANK, Defendants.

And now on this 18th day of June, 1904 come the said plaintiff and defendants by their respective attorneys, and thereupon the second petition and bond herein of the said defendant Boatmens Bank for removal of this cause to the U. S. Circuit Court for the District of Kansas, Second division, which petition and bond were filed herein June 10th, 1904, coming on to be heard, and being argued and submitted to the Court the Court finds that said bond is sufficient, but said defendant Boatmens Bank is not entitled to have the prayer of said petition allowed:

Wherefore it is ordered that said petition for removal be and the same is hereby denied and refused, to which action of the Court in denying and refusing said petition for removal of said cause to the U. S. Circuit Court for the District of Kansas said Boatmens Bank at the time duly excepted.

Whereupon the defendants D. G. Fritzlen and Edna P. Fritzlen move for judgment by default against said defendant Boatmens Bank on the causes of action stated in the answer of said defendant D. G. Fritzlen, and it appearing to the satisfaction of the Court that said defendant D. G. Fritzlen did not give notice to said defendant Boatmens Bank of the filing of said answer containing said causes of action therein against said defendant Boatmens Bank either before or after the filing of said answer of said D. G. Fritzlen and that said defendant had no notice thereof until some time after the filing of said answer: It is now ordered on the application of said Boatmens Bank that said Bank be and it is hereby permitted to file the several motions to strike out the said answer of said Fritzlen and to strike out plaintiff's reply and for judgment in favor of said Bank, which motions were filed herein on June 11th, 1904, to which the said D. G. & Edna P. Fritzlen objected & excepted.

87 And it is further ordered that said motion of D. G. Fritzlen and Edna P. Fritzlen for judgment by default against said defendant Boatmens Bank be and the same is hereby overruled, to which action of the Court said defendants Fritzlen at the time duly excepted.

Thereupon, by leave of Court, said Boatmens Bank filed a demurrer herein to paragraph two of said separate answer of defendant D. G. Fritzlen, and thereupon said defendant Boatmens Bank, by leave of Court, filed a separate demurrer as to paragraph three of the separate answer of defendant D. G. Fritzlen, and thereupon, said defendant Boatmens Bank, by leave of Court, filed a demurrer herein to the reply of plaintiff herein.

E. H. MADISON, *Judge.*

Filed July 2", 1904.
A. BAKER, *C. D. C.*
5—99

88 In the District Court of Clark County, Kansas.

W. H. WELDON, Plaintiff,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and BOATMEN'S BANK, Defendants.

Journal Entry.

And now on this October 2nd, 1905, again came said several parties by their attorneys, and thereupon the matter of the accounting herein and the other undisposed of matters herein which were adjourned to this, the September 1905 Term of this court, coming on to be heard and disposed of, said Bank objects to said accounting, and to all further proceedings herein for the reason that this cause has been removed to the U. S. Circuit Court for the District of Kansas, Second Division, and for the reasons that said accounting is not warranted by the pleadings of the parties herein, which objection was overruled by the court, and said Bank duly excepted thereto at the time.

Thereupon the Bank requested the court to make special findings of fact in the matter of taking the account of the amount due said Bank on its note and mortgages herein, and pleaded in its answer; Whereupon the evidence of the parties in the matter of said accounting was heard by the court, and the court after argument of counsel, made and entered of record its special findings of facts and its decree and judgments herein as follows:

89 *Findings of Fact, By The Court.*

I.

I find that on the 30th day of November, 1901, the cross-petitioner D. G. Fritzlen was the owner and in the possession of all of the personal property described in the chattel mortgage, a copy of which is attached to the answer of the defendant, the Boatmen's Bank; that he was on said date the owner and in the possession of the real property described in the mortgage, a copy of which is attached to the answer of the defendant, the Boatmen's Bank, and marked Exhibit C; that on said date, for the considerations hereinafter stated, the cross-petitioner, D. G. Fritzlen, executed and delivered to John H. Pinnell the promissory note, a copy of which is attached to the answer of the defendant Bank and marked Exhibit A; that on said date said cross-petitioner, D. G. Fritzlen, executed said chattel mortgage and delivered the same to the said John H. Pinnell; and that on said date said cross-petitioner and his wife, Edna P. Fritzlen, executed and delivered to said John H. Pinnell the said real estate mortgage; that on said date the said John H. Pinnell was the agent of the defendant, the Boatmen's Bank and that said instruments were executed and delivered to him for the use and benefit of said Boatmen's Bank.

II.

I find that in the year 1897 the cross-petitioner, D. G. Fritzlen, executed a promissory note in favor of one John Allen, which note was signed by D. G. Fritzlen as principal and W. H. Weldon, the plaintiff in this case, as surety. When the note came due the cross-petitioner failed to pay the same and it was paid by the plaintiff, W. H. Weldon. On July 2nd, 1903, the said cross-petitioner was indebted to the plaintiff Weldon in the sum of $3750.00, said sum being the amount due Weldon on that date because of the payment by him of the note due John Allen. That on said July 2nd,
90 1903, the defendants D. G. Fritzlen and Edna P. Fritzlen in consideration of the said debt then due said W. H. Weldon from said cross-petitioner, D. G. Fritzlen, executed a promissory note, a copy of which is attached to the petition of the plaintiff Weldon, and also on the same date, to secure the payment of the same, executed the chattel and real estate mortgages, copies of which are attached to the petition of the plaintiff, which said mortgages cover the identical property covered by the chattel and real estate mortgages theretofore given by the same parties to the Boatmen's Bank.

III.

During all the time mentioned in the second and fifth paragraphs of the answer and cross-petition of the defendant, D. G. Fritzlen, there existed at Kansas City, Kansas, and Kansas City, Missouri, a combination of persons designed for the purpose, among other things, of fixing the minimum rate of commission to be charged for services in the sale of live stock. The minimum rate of commission fixed by said combination to be demanded and received for selling live stock for others on commission was fifty cents per head or $12.00 per car load. That ever since prior to 1886 the members of the firm of commission merchants known as Offutt, Elmore & Cooper, and the members of the firm of Elmore & Cooper, and the persons composing the corporation known as the Elmore-Cooper Live Stock Commission Company were members of said combination and conducted the business of buying and selling live stock for others on commission, in compliance with the rules, regulations and by-laws fixed by said combination.

IV.

That prior to October 13th, 1897, the cross-petitioner, D. G. Fritzlen, was engaged in the business of buying, selling handling and preparing for market live stock including cattle on his ranch in Clark County, Kansas; and said cross-petitioner has ever since said
91 time been engaged in said business; that prior to October 13, 1897, said cross-petitioner's business, so far as he conducted the same through a live stock commission merchant, was handled by what is designated in the evidence as the George Holmes Commission Company. About October 13th, 1897 the cross-petitioner was indebted to the said George Holmes Commission Company as evidenced by his five promissory notes in the sum of $35,300.62, and desiring to make a change in his commission merchants a few days

prior to October 13th, 1897, the said cross-petitioner entered into an agreement with one Frank Cooper, who was at that time a member of the firm of Offutt, Elmore & Cooper, which firm was then transacting the business of buying and selling live stock for others on commission at the stock yards situated at the confluence of the Kansas and Missouri Rivers, partially in Kansas and partially in Missouri; the office of said partnership being then in the state of Kansas. On the part of said partnership the said Frank Cooper agreed to take up the notes then held by the said George Holmes Commission Company, amounting to the sum of $36,300.62, and in consideration thereof the said cross-petitioner agreed to execute and deliver to the firm of Offutt, Elmore & Cooper a chattel mortgage on 2,500 head of cattle, consisting of about fifteen hundred steers and about one thousand cows to secure the payment of the said sum of money, and to pay to said firm of Offutt, Elmore & Cooper ten per cent. discount on a part of the money to be advanced for the purpose of taking up the George Holmes paper, and eight per cent. discount on the remainder, and also entered into an agreement at the same time and place to ship said cattle to said firm for sale when they were ready for market, and to pay said firm of Offutt, Elmore & Cooper as commissions for selling said 2,500 head of cattle when the same were marketed fifty cents per head, amounting to $1250.00, $750.00 of which commission was to be included in the notes to be executed by the said cross-petitioner at the time to the said partnership of Offutt, Elmore & Cooper, and the remaining $500.00 to be included in the renewal notes then agreed by the parties to be taken at
92 the expiration of one year from the date of the transaction, if said cattle should not be marketed sooner. I find that the details of this transaction were as follows: That said cross-petitioner executed to the said partnership firm of Offutt, Elmore & Cooper his four certain promissory notes dated October 13, 1897, aggregating $31,800, due in 183 days, and by their terms bearing interest at the rate of ten per cent. after maturity, also one promissory note dated October 13, 1897, amounting to the sum of $6335.85, bearing interest at the rate of eight per cent. from maturity, and by its terms to mature twenty three days from its date. I state the discount on said notes to be the sum of $1626.19, and the net amount then credited by the said Offutt, Elmore and Cooper to the said Fritzlen to be the sum of $36,509.66. That afterwards it was ascertained that over and above the net proceeds of said five notes executed to said partnership by said cross-petitioner the sum of $541.30 was required to pay the amount due the George Holmes Commission Company and to include the $750.00 which it had been agreed between said Cooper and said Fritzlen should be the proportion of said selling commission to be included in the notes, making a total charge against the defendant Fritzlen of $37,050.96, with which to pay said sum due the George Holmes Commission Company of $36,300.69 and the $750.00 of commissions. The note of $6335.85 was paid by the cross-petitioner in cash at the time the same was due, about November 2nd, 1897.

V.

In compliance with the agreement made in October 1897 when the annual renewal of the four notes aggregating $31,800 was made, there was included in the renewal notes the balance of $500.00 due under the terms of the contract of October 13, 1897, and said amount of $31,800 was increased by the interest computed to the date of the payment at the rate of eight per cent. per annum, a loan of $2,000.00 and said $500.00 balance. The renewal notes
93 executed by the cross-petitioner in October 1898, by their terms became due April 1st, 1899. After the execution of said renewal notes and prior to their maturity the firm of Elmore & Cooper, which in January, 1898 succeeded the firm of Offutt, Elmore & Cooper, failed and was in turn succeeded by the Elmore-Cooper Live Stock Commission Company. On March 29th, 1899, the cross-petitioner not being ready to market the cattle pledged by him to secure the payment of the original loan and the notes executed by him in October, 1898, then falling due, entered into an agreement with the successor corporation by the terms of which said loan amounting to something over $38,000 was extended for 210 days. I find that the said cross-petitioner did further agree to pay the successor corporation another commission of fifty cents per head on the cattle, then numbering about 2,000 and agreed that when said cattle were marketed to consign the same to said successor corporation at the Kansas City Stock Yards, and by agreement between said corss-petitioner and said corporation $300.00 of said commission was included in the renewal notes, the remaining $500.00 to be put in the next annual renewal of said loan, unless said cattle were sooner marketed in the manner agreed upon. Accordingly the said cross-petitioner executed to said successor corporation promissory notes payable to the order of said successor corporation amounting to the sum of $42,083.58. These last mentioned notes were dated on March 29, 1899, to mature 210 days from their date, and to bear interest at the rate of eight per cent. per annum from maturity until paid. None of the notes mentioned in this or any of the preceeding paragraphs except the George Holmes Commission Company Notes was negotiable.

VI.

On March 31, 1899, the Boatmen's Bank, defendant herein, in the usual course of business purchased from the Elmore-Cooper Live Stock Commission Company the notes of the said cross-peti-
94 tioner aggregating $42,083.58, paying therefor the full amount of said notes less discount. I find that the cross-petitioner, D. G. Fritzlen, had no relations of any kind or description with the said Bank at or before said Bank purchased said notes, and that said Bank did not acquire said notes or any of them by reason of anything said or done by the said cross-petitioner, except in so far as the statements contained on said notes and in the chattel mortgage securing the same, which passed to said Bank with said notes at the time of said purchase.

On November 15, 1899 the cross-petitioner, D. G. Fritzlen, paid

to the Elmore-Cooper Live Stock Commission Company in cash, be applied on said notes of March 29, 1899 the sum of $23,940.0 leaving a balance of $18,274.50. On November 15, 1899, for t purpose of renewing the unpaid balance due on said notes of Mar 29, 1899, the cross-petitioner, D. G. Fritzlen, executed to the Elmo Cooper Live Stock Commission Company the four promissory not of that date, aggregating $19,046.07, which sum I find to be ma up by the following items:

Unpaid balance	$18,274.
Discount (183 days at 8%)	761.
Revenue Stamps	9.

By their terms the notes of November 15th, 1899, matured May 14, 1900. On May 14th, 1900, the cross-petitioner market 37 of the steers described in the chattel mortgage securing the no of March 29, 1899, and November 15, 1899, consigning the sa to the Elmore-Cooper Live Stock Commission Company, and t said 47 steers were by the said Elmore-Cooper Live Stock Co mission Company sold at said stock yards for the sum of $1455.4 I further find that from said proceeds of $1455.40 the said Elmo Cooper Live Stock Commission Company deducted the sum $90.23 for freight, $9.25 for yardage, $2.10 for feed, 15 cents revenue stamps on the sale, and a commission of $18.50 for selli said steers, said commission being estimated at fifty cents per he by said commission company, and remitted the balance
95 the Boatmen's Bank to be applied on the indebtedness of s Fritzlen. I find that at the time of the execution on Nove ber 15, 1899, by the cross-petitioner of the notes aggregating $1 046.07 the said cross-petitioner did not know that the Boatme Bank was the real owner of said notes, and that when said no were delivered to said commission company they were immediat turned over by endorsement thereon to said Boatmen's Bank.

VII.

Some time prior to November 30, 1901, the said cross-petitio learned that said Boatmen's Bank held said notes of November 1899 the unpaid balance upon which amounted to about the sum $19,000.00, and as a result of negotiations between the said co petitioner and one John H. Pinnell who was at that time and th after until December, 31, 1901, the duly authorized agent of Boatmen's Bank at said stock yards, the Boatmen's Bank agr with said cross-petitioner to furnish said cross-petitioner with sum of $3804 to pay for 317 calves and also the sum of $6044 take up an outstanding mortgage on the cross-petitioners real est which on November 30, 1901, amounted to the sum of $6044.00 furnish money to pay the taxes on the mortgaged property, and expense of operating the cross-petitioner's ranch, etc. The re of the negotiations between said cross-petitioner and said Bank that on November 30, 1901, said cross-petitioner executed to s John H. Pinnell for the benefit of said Bank a promissory note

the sum of $32,920.15, which sum was made up of the unpaid balance of the note of November 1899, and the sums advanced to take up the real estate mortgage, to purchase calves, pay the taxes, and provide for the operation of the ranch, which note was to bear interest at the rate of eight per cent. per annum from date. A copy of said note is attached to the answer of the Boatmen's Bank. To secure the payment of said note the cross-petitioner executed to said Pinnell for said Bank the chattel mortgage, a copy of which is attached to the Banks answer, and the real estate mortgage, a copy of which is attached to the answer of the Boatmen's Bank.

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VIII.

I find that on October 12, 1903, the Bank came into the possession by virtue of a writ of replevin issued out of the Circuit Court of the United States for the District of Kansas, of all of the cattle and other personal property described in the said chattel mortgage dated November 30th, 1901, which was then in existence. That no redelivery bond was given and that the said property was by said Marshal turned over to the defendant Bank shortly after he took possession of the same, and that the said Bank proceeded to sell said property under its chattel mortgage and in accordance with the terms of said mortgage, and that the net proceeds of the sales of said personal property were the sum of Eighteen Thousand Five Hundred Eighty-nine and 12/100 Dollars ($18,589.12).

IX.

I find that the tatl*a* amount of commissions charged the cross-petitioner Fritzlen by Offutt, Elmore & Cooper, and Elmore & Cooper and the Elmore-Cooper Live Stock Commission Company was the sum of $1,750.00. That the interest charged upon this sum at various times increases the amount to the sum of $2,313.06, that this sum entered into and was a portion of the consideration for the note executed to the Bank on November 30th, 1901, the same being a portion of the balance due upon the notes of November 15th, 1899, executed in favor of the Elmore-Cooper Live Stock Commission Company. That said commissions were charged in pursuance of an agreement between the members of the combination of persons mentioned in finding No. II to fix the minimum charge for selling cattle on the Kansas City market at fifty cents per head.

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Conclusions of Law.

The commissions charged defendant Fritzlen for selling cattle are illegal, said charges were in violation of law and subjected the persons making them to liability to criminal prosecution.

The cross-petitioner Fritzlen is not entitled in equity to a decree cancelling the note and mortgages owned by the Boatmen's Bank.

The note and mortgages executed to the Bank on November 30th, 1901, are void as to that portion of their consideration represented

by illegal commissions for the sale of cattle and interest charged on the same, and valid as to the remaining portion of the sum due upon them. The consideration for said note and mortgages is separable.

The mortgages held by the Boatmen's Bank are first and prior liens upon the property described in them to the extent of the valid debt due said Bank and evidenced by said instruments.

The mortgages owned by the plaintiff W. H. Weldon are a second lien upon the property described in them, and the said plaintiff Weldon is entitled to foreclose his real estate mortgage upon the said real estate described in said mortgage, and the same will be sold for the satisfaction of his debt subject to the mortgage lien of the Boatmen's Bank.

98 The court makes the following accounting between the defendant, D. G. Fritzlen, and the defendant, the Boatsmen's Bank, and finds that the amount now due the said Boatmen's Bank from the said D. G. Fritzlen upon the note and mortgages held by the Boatsmen's Bank is the sum of $15,486.19, as is more particularly shown by the items of said account made between the said parties as follows:

Statement of the Amount Due on October 2nd, 1905, on the D. G. Fritzlen Note of November 30, 1901, for $32,920.15.

Face of Note		$32,920.15
Deducting illegal commissions	$2313.06	
Balance not taken up	84.35	
		2,397.41
		$30,522.74
November 18, 1902		$30,522.74
Interest ($30,522.74 from Nov. 30, 1901 to Nov. 18, 1902, 353 days at 8% per annum)		2,394.33
		$32,917.07
Deducting, Proceeds 181 cattle (less $800)	$5281.50	
" Repayments by Clay-Robinson & Co. and W. A. Russell	632.42	
		5,913.92
		$27,003.15
November 25, 1903		$27,003.15
Interest (1 year and 7 days at 8%)		2,202.29
		$29,205.44
Deducting proceeds K. C. cattle sales		9,574.89
		$19,630.55

November 27, 1903		$19,630.55
Interest (2 days at 8%)		8.72
		$19,639.27
Deducting proceeds K. C. Cattle sale		6,372.00
		$13,267.27
December 4th, 1903		$13,267.27
Interest (7 days at 8%)		20.65
		$13,287.92
Deducting proceeds cattle sales at K. C.		112.00
		$13,175.92
December 8, 1903		$13,175.92
Interest (4 days at 8%)		11.72
		$13,187.64
Deducting proceeds horse sales	$2,565.00	
" " sale oil cake	348.34	
		2,913.34
99		$10,274.30
December 24, 1903		$10,274.30
Interest (16 days at 8%)		36.54
		$10,310.84
Deducting proceeds cattle sale		208.00
		$10,102.84
October 2, 1905		$10,102.84
Interest (1 year and 282 days at 8%)		1,441.37
		$11,544.21
Deducting proceeds cattle sales Oct. 7, '04	$37.50	
" " " " " 27, '04	19.74	
		57.24
Balance due from Fritzlen to the Bank on acc't Note		$11,486.97

Account of Moneys Advanced by the Bank to D. G. Fritzlen under the Chattel Mortgage of November 30, 1901, with Interest Calculated to October 2, 1905, at 6% Per Annum.

1902.				
Dec. 26.	D. G. Fritzlen's draft for pasturage...	$250.00		
	Int. on above (2 y'rs 280 days).....	41.67		
				$291.67
1903.				
Jan. 28.	Labor and exp. by C. F. Lukins.....	240.00		
	Int. on same (2 y'rs 247 days).....	38.68		
				278.68
M'ch 23.	Taxes on D. G. F.'s personal property..	281.40		
	Int. on same (2 y'rs 193 days).....	42.82		
				324.22
Feb. 6.	Oil cake for cattle.....	792.00		
	Int. on same (2 y'rs 238 days).....	110.61		
				902.61
M'ch 10.	Oil cake for cattle.....	647.50		
	Int. on same (2 y'rs 206 days).....	99.93		
				747.43
M'ch 18.	Tom Ellis, labor at ranch.....	42.00		
	Int. on same (2 y'rs 198 days).....	6.43		
				48.43
M'ch 25.	Mdse. and supplies.....	261.29		
	Int. on same (2 y'rs 191 days).....	39.67		
				300.96
M'ch 28.	Oil cake for cattle.....	388.50		
	Int. on same (2 y'rs 188 days).....	58.80		
				447.30
Apr. 27.	W. C. Couch, hauling oil cake.....	49.38		
	Int. on above (2 y'rs 158 days).....	7.25		
				56.63
May 6.	M. Morrison, labor.....	30.00		
	Int. on same (2 y'rs 149 days).....	4.36		
				34.36
May 7th.	D. Fisher, Mdse. for ranch.....	21.70		
	Int. on same (2 y'rs 148 days).....	3.13		
				24.83
May 21.	E. E. Coons for corn.....	$18.00		
	D. Fisher, Mdse.....	26.13		
			44.13	
	Int. on same (2 y'rs 134 days).....		6 29	
				50.42
May 26.	M. Morrison, labor.....	30.00		
	Int. on same (2 y'rs 129 days).....	4.25		
				34.25
June 10.	D. Fisher, Mdse.....	29.29		
	Int. on same (2 y'rs 114 days).....	4.09		
				33.38

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June 22.	M. Morrison labor	$30.00		
	D. Fisher, Mdse	11.40		
			41.40	
	Int. on same (2 y'rs 102 days)		5.68	
				$47.08
June 26.	G. F. Trager, Mdse		9.45	
	Int. on same (2 y'rs 98 days)		1.29	
				10.74
July 21.	D. Fisher, Mdse		13.22	
	Int. on same (2 y'rs 73 days)		1.75	
				14.97
July 23.	M. Morrison, labor		30.00	
	Int. on same (2 y'rs 71 days)		3.96	
				33.96
July 30.	D. Fisher, Mdse		13.90	
	Int. on same (2 y'rs 64 days)		1.82	
				15.72
Aug. 24.	M. Morrison, labor		30.00	
	Int. on same (2 y'rs 39 days)		3.80	
				33.80
Sept. 21.	M. Morrison, labor		30.00	
	Int. on same (2 y'rs 9 days)		3.64	
				33.64
Oct. 27.	D. Fisher, Mdse		35.22	
	Int. on same (1 y'r 340 days)		4.11	
				39.33
Oct. 23.	M. Morrison, labor		30.00	
	Int. on same (1 y'r 344 days)		3.53	
				33.53
Nov. 15.	To Riley Kinslow		16.00	
	Int. on same (1 y'r 321 days)		1.82	
				17.82
Nov. 21.	O. G. Young, pasturage, board & labor.		365.85	
	Int. on same (1 y'r 315 days)		51.13	
				416.98
Nov. 23.	C. F. Lukens, expense	$15.00		
	A. S. Sission, labor	11.50		
			26.50	
	Int. on same (1 y'r 313 days)		2.99	
				29.49
Nov. 30.	H. Plummer, labor		3.00	
	Int. on same (1 y'r 306 days)		.33	
				3.33
Dec. 4.	R. Trummel, labor		6.00	
	Int. on same (1 y'r 302 days)		.66	
				6.66
Dec. 7.	C. F. Cummins, labor		6.00	
	Int. on same (1 y'r 299 days)		.66	
				6.66

Dec.	8.	Jno. Simmons, labor.....	28.50	
		Int. on same (1 y'r 298 days).....	3.05	31.55
Dec.	8.	J. F. Jones, labor.....	24.25	
		Int. on same (1 y'r 298 days).....	2.69	26.94
Dec.	11.	C. F. Lukens, expenses.....	25.00	
		Int. on same (1 y'r 295 days).....	2.73	27.75
Dec.	14.	C. F. Lukens, expense.....	42.78	
		Int. on same (1 y'r 292 days).....	4.67	47.45
1904.				
Jan.	8.	Tax on horses.....	41.69	
		Int. on same (1 y'r 267 days).....	4.33	45.82
1902.				
Feb.	20.	T. C. Kelly, inspection of cattle prior to execution of mortgage.....	138.48	
		Int. on same (3 y'rs 224 days.....	30.09	168.57
Oct. 2, 1905.		Total advances under mortgage to date.....		$4666.94

Credits to Which Mr. Fritzlen is Entitled Upon Money Advanced Under the Chattel Mortgage, With Interest Figured at 6 % Per Annum to October 2nd, 1905.

1903.				
Jan.	8.	Clay Robinson & Co.'s share pasture bill for 1902.....	64.20	
		Int. on same (2 y'rs 267 days).....	10.63	74.83
Feb.	6.	W. A. Russell's share pasture 1902...	14.60	
		Int. on same (2 y'rs 238 days).....	2.35	16.95
101				
Feb.	3	Clay, R. & Co.'s exp. in $240 draft....	27.56	
		Int. on same (2 y'rs 241 days).....	4.41	31.97
Feb.	6.	W. A. Russell's exp. in $240 draft.....	25.28	
		Int. on same (2 y'rs 238 days).....	4.03	29.31
M'ch	23.	Clay, R. & Co.'s share personal tax...	31.80	
		Int. on same (2 y'rs 193 days),..	4.84	36.64
M'ch	25.	W. A. Russell's share personal tax...	29.10	
		Int. on same (2 y'rs 191 days).....	4.43	33.53
May	23.	C. R. & Co.'s *pro rata* exp. to date.....	228.52	
		Int. on same (2 y'rs 132 days).....	32.45	260.97

May 28.	W. A. Russell's *pro rata* exp. to date..	160.81	
	Int. on same (2 y'rs 127 days).....	22.71	
			183.52
Oct. 2, 1905.	Total credits on advanced money.....		$667.72
	Total debits (money advanced under chat. mtg.).....		$4,666.94
	Total Credits on same		667.72
	Bal. due from Fritzlen to Bank a/c adv. under chattel mtg		$3,999.22
	Balance due on Note Oct. 2, 1905.....		$11,486.97
	Bal. due on acc't money advanced under chattel mortgage.....		3,999.22
	Total due from Fritzlen to the Bank Oct. 2, 1905.....		$15,486.19

It is considered, ordered and adjudged by the Court that each party to the accounting pay the costs by him made or expended. To which ruling and judgment the defendant Boatmen's Bank then and there excepted and objected.

It is further considered, ordered and adjudged by the Court that the allegations of the petition of the plaintiff, W. H. Weldon, for the foreclosure of his mortgages as set out in his petition are true as against the defendants, D. G. Fritzlen and Edna P. Fritzlen, and that there is due the plaintiff from the defendants D. G. Fritzlen and Edna P. Fritzlen upon the promissory note of said defendants, the sum of $4440.28 as ascertained by the verdict of the jury in this case returned in open court on the 6th day of May, 1905, upon which verdict judgment is rendered in favor of the plaintiff W. H. Weldon and against the defendants D. G. Fritzlen and Edna P. Fritzlen in the said sum of $4440.28.

It is further found by the Court that the real estate mortgage in plaintiff's petition set forth is a lien upon the premises
102 therein described, subject to the prior lien of the real estate mortgage of the defendant, The Boatmen's Bank, set out in the answer of the said Boatmen's Bank.

It is further ordered and adjudged that the following lands and tenements in plaintiff's petition described, situated in the County of Clark and State of Kansas, to-wit:

	Sec.	Twp.	Range.
N. E. ¼ N. E. ¼	33	30	22
S. E. ¼ S. W. ¼	6	30	22
E. ½ N. W. ¼	7	31	22
N. E. ¼	12	31	23
N. W. ¼	12	31	23
S. ½ S. W. ¼	1	31	23
N. E. ¼ N. E. ¼	11	31	23

		Sec.	Twp.	Range.
	N. W. ¼	10	31	23
	S. W. ¼	9	31	23
	Lots 1 & 3 in	1	30	23
	E. ½ S. E. ¼	1	30	23
	S. E. ¼ S. E. ¼	11	30	23
	S. E. ¼ N. E. ¼	13	30	23
	All of	14	30	23
	N. ½ S. E. ¼	24	30	23
	S. E. ¼ S. W. ¼	24	30	23
	W. ½ N. E. ¼	21	30	23
	N. W. ¼ S. E. ¼	21	30	23
	N. ½ N. W. ¼	22	30	23
	N. ½ S. W. ¼	11	30	23
	N. E. ¼ N. E. ¼	21	30	23
	S. W. ¼ S. W. ¼	21	30	23
	N. ½ S. E. ¼	28	30	23
	W. ½ S. W. ¼	27	30	23
	N. ½ S. W. ¼	35	30	23
	S. E. ¼	35	30	23
	W. ½ N. E. ¼	3	31	23
	N. E. ¼ S. E. ¼	3	31	23
	S. E. ¼ S. W. ¼	3	31	23
	N. ½ N. W. ¼	11	31	23
	S. W. ¼ N. E. ¼	11	31	23
	E. ½ S. W. ¼	11	31	23
	W. ½ S. W. ¼	23	30	23
	W. ½ N. W. ¼	34	30	22
	Lot 2	7	30	22
	N. W. ¼	7	31	22
	N. E. ¼ S. E. ¼	12	31	23
	S. E. ¼ S. E. ¼	1	31	23
	S. E. ¼ S. E. ¼	2	31	23
	S. E. ¼	4	31	23
	N. E. ¼	9	31	23
	S. E. ¼	9	31	23
	S. E. ¼ N. E. ¼	1	30	23
	E. ½ S. E. ¼	11	30	23
	S. E. ¼ N. E. ¼	11	30	23
	N. ½ S. W. ¼	13	30	23
	S. ½ N. E. ¼	24	30	23
	S. W. ¼ S. E. ¼	24	30	23
103	E. ½ N. W. ¼	25	30	23
	N. E. ¼ N. W. ¼	21	30	23
	N. ½ N. E. ¼	22	30	23
	S. W. ¼ N. W.	11	30	23
	N. W. ¼ S. E.	11	30	23
	S. E. ¼ N. W. ¼	22	30	23
	E. ½ N. E. ¼	28	30	23
	S. W. ¼ N. W. ¼	27	30	23
	S. W. ¼ N. W. ¼	35	30	23
	S. ½ S. W. ¼	35	30	23

	Sec.	Twp.	Range.
N. E. ¼	35	30	23
S. E. ¼ N. E. ¼	3	31	23
S. ½ S. E. ¼	3	31	23
S. W. ¼ S. W. ¼	2	31	23
N. W. ¼ N. E. ¼	11	31	23
N. W. ¼ S. E. ¼	11	31	23
W. ½ N. W. ¼	23	30	23

be sold by the Sheriff of Clark County according to law but without appraisement at the expiration of ten days from this date, the 2nd day of October, 1905, in default of payment, subject to the prior lien of the said Boatmen's Bank as herein set out in the sum of $15,486.19, and that the proceeds of said sale be applied, first to the satisfaction of the costs of the foreclosure of said mortgage of said W. H. Weldon, and then to the payment of the plaintiff's judgment herein, that upon said sale, and after the confirmation thereof, the Sheriff of Clark County, Kansas, issue to the purchaser at said sale a good and sufficient certificate of purchase as required by law providing for the redemption of said lands from said sale within eighteen months from the date of said sale, and that after the expiration of said period of redemption that all of the defendants to this action, except the said Boatmen's Bank, and all persons claiming or to claim through or under them or either of them be barred and foreclosed of and from all right, title, interest or equity of redemption in and to the above described premises and each and every part and parcel thereof from and after said sale.

It is further considered, ordered and adjudged by the Court that the defendant, the Boatmen's Bank, recover its costs taxed at the sum of $— against the defendants D. G. Fritzlen and Edna
104 P. Fritzlen upon the 1st, 2nd and 4th causes of action set out in the cross-petition of said D. G. Fritzlen and Edna P. Fritzlen; and it is further ordered and adjudged by the Court that the said D. G. Fritzlen and Edna P. Fritzlen take nothing under said several causes of action numbered 1, 2 and 4 in their cross-petition against the said Boatmen's Bank. To which rulings and judgments the defendants Fritzlen and Fritzlen then and there excepted and objected.

It is further ordered and adjudged by the court that the plaintiff W. H. Weldon take nothing upon his cause of action against the said Boatmen's Bank, and that the said Boatmen's Bank recover against said W. H. Weldon its costs expended in the litigation of the cause of action stated in the petition of said Weldon against said Boatmen's Bank. To which ruling and judgment the plaintiff W. H. Weldon then and there excepted and objected. Such costs taxed at $—.

It is further considered, ordered and adjudged by the Court that the defendant D. G. Fritzlen have judgment against the defendant Boatmen's Bank in the sum of $4,100.00 upon the verdict of the jury rendered on the 6th day of May, 1905, in this cause, upon the cause of action against the said Boatmen's Bank by the said D. G.

Fritzlen for damages as set out in the cross-petition of the said D. G. Fritzlen against the said Boatmen's Bank, and that the said D. G. Fritzlen also recover his costs against the said defendant, The Boatmen's Bank, upon said cause of action in the sum of $—. To which ruling and judgment the said Boatmen's Bank then and there excepted and objected.

And thereupon on the same day the Court after due consideration overruled the motion to set aside the verdict of the jury and for a new trial of the said Bank, filed herein by said Bank on May 6th, 1905, and said Bank then and there at the time duly excepted to said overruling of said motion.

105 And thereupon the Court, after due consideration, overruled the motion for a new trial filed herein by said Bank August 9th, 1905, and said Bank duly excepted at the time to the overruling of said last motion.

Thereupon on the same day and after the making of said findings of facts decree and judgment said Bank again filed its motion for a new trial herein, which last motion *ass*, after due consideration, overruled by the Court, and said Bank at the time duly excepted to the overruling of said last motion.

Thereupon on the same day the said Bank filed its motion in arrest of judgment herein, which motion being submitted to the Court was by the court, after due consideration, overruled, to which last overruling the said Bank at the time duly excepted.

Thereupon and on the same day said Bank filed its motion for an extension within which to make and serve on the other parties herein a case for the Supreme Court of Kansas which motion was sustained by the Court, and said Boatmens Bank for good cause shown was and by this order is given by the Court until January 1st, 1906, within which to make and serve on said other parties its case herein for said Supreme Court, the other parties being present in open Court, thereupon said Boatmen's Bank filed herein its notices served on said other parties notifying them of said extension of time, thereupon at the same time said Boatmen's Bank presented to the Court and filed its supersedeas bond herein in the sum of $10,000.00 with the American Bonding Company of Baltimore, as Surety, and said bond is by the Court and by the Clerk thereof approved, and it is ordered by the Court that all further process, proceedings and steps herein in favor of said plaintiff and of said defendants D. G. Fritzlen and Edna P. Fritzlen be and the same are hereby stayed until the determination of this cause by said Supreme Court.

106 And on said 2nd day of October, 1905, comes on to be heard the motion of W. H. Weldon for a new trial upon the cause of action set out in his petition against said Boatmen's Bank. The Court having heard the argument of counsel and being fully advised in the premises overruled said motion, to which said ruling the Plaintiff, W. H. Weldon, then and there excepted and objected.

And also on said day comes on to be heard the motion of D. G. Fritzlen and Edna P. Fritzlen for a new trial upon their causes of action in their cross-petition numbered 1 and 4 against their defendant, the Boatmen's Bank. The Court having heard the argument of counsel and being fully advised in the premises overruled

said motion, to which ruling the said D. G. Fritzlen and Edna P. Fritzlen then and there excepted.

And also on said 2nd day of October, 1905, the court on application of the said D. G. Fritzlen and Edna P. Fritzlen, in open court, all parties being present and taking notice thereof, ordered that the time be extended in which said D. G. Fritzlen and Edna P. Fritzlen might make and serve a case for the Supreme Court until January 1st, 1906, the defendants to have twenty days after service of case in which to suggest amendments. Five days' notice to be given by either party of time and place of settling and signing said case.

And on said 2nd day of October, 1905, the Court upon application of said W. H. Weldon in open court, all parties to this action being present and taking notice thereof, ordered that the time be extended in which said W. M. Weldon might make and serve a case for the Supreme Court to January 1st, 1906, the defendants to have twenty days after service of said case in which to suggest amendments, five days' notice to be given by either party of the time and place of the settling and signing of said case.

(Signed) E. H. MADISON, *Judge.*

107 Be it further remembered, that afterwards on the 4th day of January 1907, the same being one of the regular judicial days of the January 1907 term of the supreme court of the State of Kansas*m* said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record to-wit:

108 In the Supreme Court of the State of Kansas.

14884.

BOATMEN'S BANK, Plaintiff in Error,
vs.
E. J. FRITZLEN ET AL., Defendants in Error.

Journal Entry of Submission.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Clark County; and thereupon after oral argument by J. S. Bottsford for the plaintiff in error and by D. R. Hite for the defendants in error, said cause is *submitted* on brief of counsel for both parties and taken under advisement by the court.

99 Be it further remembered that afterwards on the 6th day of April 1907 the same being one of the regular judicial days of January A. D. 1907 term of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record to-wit

110 In the Supreme Court of the State of Kansas.

No. 14884.

BOATMEN'S BANK OF ST. LOUIS, MO., Plaintiff in Error,
vs.
E. J. FRITZLEN ET AL., Defendants in Error.

Journal Entry of Judgment.

This cause comes on for decision and thereupon it is ordered and adjudged that the ruling of the court below denying the second petition for removal and holding this cause for trial being erroneous, the judgment of the court below be *reversed* and that this cause be *remanded* for further proceedings in harmony with the courts written opinion filed herein. It is further ordered that the defendants in error pay the costs of this case in this court taxed at $..... and hereof let execution issue.

111 And on the same day to-wit: the 6th day of April 1907, there was filed in the office of the clerk of the supreme court of the state of Kansas the courts written syllabus and opinion in the above entitled cause which syllabus and opinion is in words and figures as follows to-wit:

112 No. 14884.

BOATMANS BANK OF ST. LOUIS, MISSOURI,
v.
D. G. FRITZLEN ET AL.

Error from Clark County.

Reversed.

Syllabus by the Court, Johnston, C. J.

1. The institution of a fictitious action in a court of the state of which the plaintiff is a citizen, for the purpose of bringing two defendants of diverse citizenship—one being a non-resident—into such court, to enable the resident defendant to litigate a cause of action against the non-resident defendant in that court, and to prevent the non-resident defendant from removing such cause into the federal court, is a fraud upon the the jurisdiction of the federal court and upon the non-resident defendant, and upon a seasonable application by the non-resident defendant the sham plaintiff should be disregarded and the real controversy removed to the federal court.
2. The averments of fraud, as well as all issues of fact raised by the petition for removal, are to be tried in the federal court. The only question for a state court to decide is one of law, whether,

admitting the facts alleged in the petition and disclosed by the record to be true, the cause is a removable one.

3. A petition for removal is filed in time if it is filed by the defendant as soon as the record in the cause or the acts of the parties show it to be a removable cause.

4. The time within which a cause may be removed, being a requirement of mode and form and not of jurisdiction, is a subject of
113 waiver and estoppel, and a party who fraudulently attempts to prevent a removal, whereby the defendant fails to file his petition for removal within the statutory time, will not be allowed to take advantage of his own wrong, but will be estopped to object that the petition for removal was not filed in time.

5. In considering a petition for removal a court should disregard an improper or sham party who has injected a fictitious cause of action into the case and may arrange the actual parties on opposite sides of the real controversy according to their respective interests, and if there then appears to be a controversy between citizens of different states, involving the requisite amount, the cause may be removed.

All the Justices concurring.
A true copy.
Attest:

Clerk Supreme Court.

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No. 14884.

BOATMENS BANK OF ST. LOUIS, MISSOURI,
v.
D. G. FRITZLEN ET AL.

Error from Clark County.

Statement.

On July 23, 1903, W. H. Weldon instituted an action in the district court of Clark county, Kansas, asking for judgment for $3,750 against D. G. Fritzlen and Edna P. Fritzlen upon a promissory note executed July 2, 1903 due ten days after date, and to foreclose mortgages on real and personal property of the Fritzlens. The Boatmens Bank of St. Louis, Missouri, was named as a defendant, and it was alleged that the bank claimed some interest in the mortgaged property under mortgages held by it, but that these were illegal and of no effect. On August 13, 1903, the Boatmens Bank filed its petition and bond for removal to the United States Circuit Court for the District of Kansas, in which it was alleged that it was a citizen of Missouri, and that Weldon and the Fritzlens were citizens of Kansas, and it stated as a first ground of removal that there was a separable controversy between Weldon and the bank, and as a second ground that the bank could not obtain justice in that court because of preju-

dice and local influence. The controversy reached the federal court on September 14, 1903, when the motions of Weldon and the Fritzlens to remand were considered and denied. On October 9, 1903, the Boatmens Bank brought a replevin action in the federal court to recover the personal property of the Fritzlens covered by the bank's mortgage. On April 2, 1904, the motions to remand were renewed and later an order was made sustaining the motions and remanding the cause to the state court. (Weldon *v.* Fritzlen, 128 Fed. 608.) On April 25, 1904, the motion of the Fritzlens to dismiss the replevin action was sustained by the federal court, but that judgment was subsequently reversed by the United States Circuit Court of Appeals. (Boatmens Bank *vs.* Fritzlen, 135 Fed. 650.) On May 14, 1904, the bank filed an answer which, in effect, denied the allega-
115 tions of Weldon's petition, but asked for no affirmative relief. On May 26, 1904, Weldon filed a reply to the bank's answer, and on the same day D. G. Fritzlen filed an answer in the case, which admitted the execution of the Weldon note and mortgages, but denied that he was indebted to the plaintiff in the amount claimed. He then set up as a first defense against the bank's note and mortgages that illegal commissions for the sale of cattle were included in the note and that they were therefore void. A second defense was that the bank was a foreign corporation and that it had not been authorized to do business in Kansas. As a third defense he set up a counterclaim for $20,000 as damages for the breach of a contract, and as a fourth defense set up a counterclaim for $25,000 for the conversion of the personal property which the bank had taken under a writ of replevin. The first and second defenses of Fritzlen's answer against the bank was identical with the defenses set forth in Weldon's reply to the bank's answer. On June 10, 1904, the bank filed its second petition and bond for removal, alleging, first, that there was a separable controversy, and second, that the action was fraudulently brought by Weldon and Fritzlen to prevent a removal of the cause to the federal court and to defeat the jurisdiction of the federal court over the real controversy between the bank and the Fritzlens. On this ground the bank alleged:

" * * * * * * *

"This defendant, Boatmens Bank, further shows and avers that this defendant had no knowledge either by its officers or attorneys of the filing of said separate answer of defendant D. G. Fritzlen and said reply of plaintiff of May 26th, 1904, until Saturday, June 4th, 1904, on which last day the attorneys of said bank were furnished with copies of said answer and reply by the Clerk of the District Court, and that the time within which this defendant, Boatmens Bank, is required to plead or answer to said separate answer has not yet expired according to the statutes or the rules of practice
116 of the State of Kansas, and that neither said Boatmen's Bank or its attorneys herein have been served with said separate answer of defendant D. G. Fritzlen, or required by an order of court to plead, answer or demur to said separate answer, and that said separate answer is in all that is contained therein, after paragraph one, a new suit on the part of D. G. Fritzlen against this defendant Boatmens Bank.

"Said defendant Boatmens Bank further avers and shows to the court that this suit in its inception and in the conducting thereof was and has been fraudulently instituted and maintained by plaintiff Weldon and defendant Fritzlen for the purpose of fraudulently preventing this defendant Boatmens Bank from removing this action to the United States Circuit Court, as prayed for in this petition; that Boatmens Bank has no interest whatever in the mortgages and note held by plaintiff and made to him by defendant Fritzlen and mentioned in plaintiff's petition in this cause, and that as appears from said separate answer of defendant D. G. Fritzlen, there was and has been and is now no controversy between plaintiff and defendant Fritzlen as to the said mortgages and note of plaintiff and the foreclosure thereof, and said defendant Boatmens Bank further charges and avers that this suit was brought in the manner and form of the bringing of the same not for the purpose of adjudicating or settling any controversy between plaintiff Weldon and the defendants Fritzlen, but for the purpose, fraudulently, of enabling the defendant Fritzlens to maintain their said suit set up in their said separate answer herein against this defendant Boatmens Bank, and to litigate the same in the State Court, and to prevent the trial of said controversy between said Fritzlens and this defendant, Boatmens Bank, in the United States Circuit Court.

"The defendant Boatmens Bank further avers and states that the defendant Fritzlens herein were and have been in default from the time of the institution of this suit until the filing of said separate answer herein, by and with the consent, connivance and collusion of the plaintiff herein, and that by agreement between plaintiff and defendant Fritzlens the said separate answer of D. G. Fritzlen was withheld and not filed until after the remanding of this cause on the first petition filed by this petitioner so as to prevent it being made to appear while this action was pending on said former petition in the United Staets Court that this suit was maintained for the fraudulent purposes aforesaid, and that the controversies herein were wholly between citizens of different states.

* * * * * * *".

The petition for removal was denied, and the trial which followed in the district court resulted in favor of Weldon and the Fritzlens. The bank complains.

No. 14884.

BOATMENS BANK OF ST. LOUIS, MISSOURI,
v.
D. G. FRITZLEN ET AL.

Error from Clark County.

Reversed.

The opinion of the court was delivered by JOHNSTON, *C. J.*:

Many errors are assigned on the rulings made in the various stages of the trial, but the first and controlling one is based on the

decision denying the petition for removal to the federal court. There was a remand on the first petition for removal, and under the Act of Congress the decision on that motion is not reviewable. (25 Stat. at Large 434.) In its first petition the bank, a citizen of Missouri, insisted that it had a separable controversy with the plaintiff, and alleged, as a second ground, prejudice and local influence. The first petition did not raise the issue of fraudulent joinder, but when D. G. Fritzlen answered and disclosed the conspiracy and fraudulent purpose of Weldon and Fritzlen and the theory on which they intended to proceed the second petition was filed on the ground of diversity of citizenship, and it alleged that the action had been fraudulently instituted and maintained by Weldon, not to adjudicate any controversy with the Fritzlens, but for the fraudulent purpose of preventing the bank from removing the case to the federal court for a trial of the causes of action against the bank set forth in the answer and cross-petition of D. G. Fritzlen.

Was the bank entitled to an order of removal on the second petition, and at that time? The right of removal as given by the constitution and laws of the United States cannot be defeated by any artifice or device of parties. It is well settled that the joining of nominal parties, sham parties, or of persons fraudulently
119 brought in to prevent removal, will not defeat the right of removal by the real party in interest if the jurisdictional facts exist as to him.

In speaking of devices of this character, in Arapahoe County *v.* Railroad Co., 4 Dill. (U. S. C. C.) 277, Justice Miller said:

"It would be a very dangerous doctrine—one utterly destructive of the rights a man has to go into the federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in the federal courts. We must, therefore, be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

In Dow *v.* Bradstreet, 46 Fed. 824, it was alleged in a petition for removal that a resident defendant had been joined with a nonresident defendant to prevent a removal, and that the resident defendant was a sham party with no interest whatever in the controversy. On the right to remove the case Justice Shiras said:

"The reasoning which sustains the doctrine, which is now too firmly established to be called in question, that in determining the jurisdiction of the Circuit Court of the United States regard will be had only to the citizenship of the real parties in interest, disregarding wholly all nominal or immaterial parties upon the record, seems to me to be equally applicable to cases wherein it is made to appear that a party, having in fact no interest in or actual connection with the subject of litigation, has been joined as a party with those actually interested, for the sole purpose of defeating the jurisdiction of the federal court. A fraud of this nature, if successful, deprives the citizen of a right conferred upon him by the constitution and laws of the United States, and it certainly must be true that it cannot

be perpetrated without a remedy existing for its correction. Unless this be so, then it is possible to defeat in every instance the right of removal, when the same depends upon the citizenship of the adversary parties, by the easy device of joining as a party one who
120 has no interest in the case, but who is a citizen of the same state as the plaintiff."

Prince *v.* Illinois Central Railway Co., 98 Fed. 1, was a case brought by a brakeman, a citizen of Kentucky, for an injury inflicted by the railway company, a citizen of Illinois. He joined as defendants two employees of the company, citizens of Kentucky. On a petition for removal it was alleged that these employees were named as defendants in fraud of the jurisdiction of the federal court and solely for the purpose of preventing a removal of the action. Later, upon an issue joined in the federal court on the subject of fraud it was shown that neither of them had any connection with the injury or any responsibility for it, and it was remarked:

"The court is therefore of the opinion that the joinder of Carroll and Smith, under the circumstances, is equivalent to a fraud upon the jurisdiction of this court, which it would be discreditable to wink at or fail to see."

It is true, as defendants in error contend, that a plaintiff is entitled to present his theory of the case in his petition and in his own way, and when he elects to bring a joint action a defendant has no right to insist that it shall be several, nor can he convert it into a several action by the answer which he files. Many cases, including Alabama Great Southern Railway Co. *v.* Thompson, 200 U. S. 206, affirm this doctrine, but that case, as well as those which it follows, proceeds upon the theory that the parties are acting in good faith. In that case the court in its opinion stated that there was nothing in the case to suggest an attempt to commit a fraud upon the jurisdiction of the federal court. The court, however, cautiously pointed out an exception which should be made where there were fraudulent attempts to prevent removals. It was said:

"The fact that by answer the defendant may show that the liability is several cannot change the character of the case made by the plaintiff in its pleading so as to affect the right of removal. It is to be remembered that we are not now dealing with joinders which are shown by the petition for removal or otherwise to be attempts
121 to sue in the state courts with a view to defeat federal jurisdiction. In such cases entirely different questions arise and the federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in federal courts of the protection of their rights in those tribunals."

In the more recent case of Wecker *v.* National Enamling Co., 204 U. S. 176, the question of fraudulent joinder was brought directly before the Supreme Court of the United States. There Wecker, a citizen of Missouri, brought an action against a corporation, a citizen of New Jersey, for injuries alleged to have been occasioned through negligence. He joined with the corporation one Wettengal, a citizen of Missouri. In a petition for removal it was alleged that Wettengal was frauduently joined as a defendant, for the purpose of fraud-

ulently preventing, or attempting to prevent, the defendant from removing the cause to the United States Circuit Court, and that plaintiff well knew that Wettengal's relation to the corporation was not such as to make him liable, and that he was not joined in good faith, but to prevent a removal. An issue was formed on the motion to remand, but the Circuit Court found, on affidavits which were filed, that the joiner of Wettengal was palpably groundless and fictitious, and therefore denied the motion. The Supreme Court, on review, held that the trial court was right in its conclusions that Wettengal was joined for the purpose of defeating the right of removal, and in doing so it was said:

"While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."

To the claim that there was no proof that Wecker knew of Wettengal's true relations to the defendant, and consequently that he could not be guilty of fraud in joining him, it was said that "Even
122 in cases where the *the* direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to inform within his reach."

The following authorities support the doctrine announced above:

McHenry *v.* New York, P. & O. R. Co., (C. C.), 25 Fed. 65;
Collins *v.* Wellington, (C. C.), 31 Fed. 244;
Arrowsmith *v.* Nashville & D. R. Co., (C. C.), 57 Fed. 165;
Warax *v.* Cincinnati, N. O. & T. P. Ry. Co., (C. C.), 72 Fed. 637;
Hukill *v.* Marysville & B. S. R. Co., (C. C.), 72 Fed. 745;
Landers *v.* Felton, (C. C.), 73 Fed. 311;
Durkee *v.* Illinois Cent. R. Co., (C. C.), 81 Fed. 1;
Union Terminal Ry. Co. *v.* Chicago, B. & Q. R. Co., (C. C.), 119 Fed., 209;
Ross *v.* Erie R. Co., (C. C.), 120 Fed. 703;
Kelly *v.* Chicago & A. Ry. Co., (C. C.), 122 Fed. 286;
Boatner *v.* American Express Co., (C. C.), 122 Fed. 714;
Crawford *v.* Illinois Cent. R. Co., (C. C.), 130 Fed. 395;
Bishon *v.* Cincinnati, N. O. & T. O. Ry. Co., (C. C. A.), 133 Fed. 471;
Boatmens Bank v. Fritzlen, (C. C. A.), 135 Fed. 650;
Knuth *v.* Butte Electric Ry. Co., (C. C.), 148 Fed. 73;
Yawkey *v.* Richardson, 9 Mich. 529;
Illinois Cent. R. Co. *v.* Coley, 89 S. W. (Ky.), 234;
Southern R. Co. *v.* Litteson, 74 N. E. (Ind. App.) 898.

The averments in the petition for removal as to the bad faith and fraudulent purposes of Weldon and Fritzlen when accepted as true make out a *prima facie* showing of an attempt to evade the jurisdiction of the federal court. Especially is this so when these averments are considered in connection with the statements in the pleadings of

these parties which were on file when the petition was presented. According to the averments in the petition for removal the action brought by Weldon was fraudulent in its inception and had been fraudulently maintained. While he set up a note and mortgages against the Fritzlens, it was alleged by the bank that there was no controversy between Weldon and the Fritzlens as to the note
123 or the foreclosure of the mortgages, and that there never had been any controversy with respect to these. Since Weldon had no controversy with the Fritzlens it follows that he had none with the bank. He is therefore a sham party who instituted a fictitious action, for the alleged fraudulent purpose of enabling Fritzlen to litigate in the state court his causes of action against the bank set up in his answer and cross-petition, and to prevent the bank from removing such controversy to the federal court. In addition to all this, the pleadings disclose that Weldon's alleged note from the Fritzlen became due ten days after it was made; that his mortgages were taken upon property already mortgaged for more than $32,000, and that only eleven days after the note became due, and twenty-one days after it was made Weldon brought his sham action, making the bank a party defendant. The answer and cross-petition of D. G. Fritzlen and the reply of Weldon were filed on the same day and concurrently alleged that the bank's note and mortgages were invalid, and further that it had no authority to enforce them in court. The bringing of an action by a plaintiff who has no actual controversy with the defendants and for the purposes stated operates as a legal fraud upon the federal court as well as upon the party entitled to a removal. The institution of a fictitious action for the purpose of bringing two defendants of diverse citizenship—one being a non-resident—into a state court, to enable the resident defendant to litigate a cause of action against the non-resident defendant in the state court, and to prevent the non-resident defendant from removing the cause to the federal court, is as much a fraud upon the jurisdiction of the federal court and upon the non-resident defendant as is the fraudulent joining of a sham defendant. Under the authorities cited such sham party may be ignored and the right of removal determined between the actual parties to the real controversy.

The averment as to fraud, as well as all issues of fact raised by the petition for removal, are to be tried in the federal court alone. On a petition for removal the only question for a state court to decide is one of law, and that is whether admitting the facts alleged in the petition and disclosed by the record to be true the applicant
124 has a right to a removal.

(Railway Co. *v.* Stone, 70 Kan. 708, 711;
Removal Cases, 100 U. S. 457, 472;
Burlington &c., Railway Co. *v.* Dunn, 122 U. S. 513;
Railroad Co. *v.* Daughtry, 138 U. S. 298;)

Was the second petition filed in time? It is contended that as it was not filed at or before the time when the bank was required under the code to answer Weldon's petition, it is too late. If the fraudulent conduct of Weldon and Fritzlen occasioned the delay of the bank in setting up their fraud as a ground for removal they

should not be allowed to take advantage of the delay and of their own wrong, and especially where the bank asked for removal as soon as their fraud was incovered.

In Powers *v.* Chesapeake & Ohio Railway Co., (C. C.), 65 Fed. 129, where the facts showed that a joinder and subsequent dismissal were a mere device of the plaintiff to defeat a removal by a non-resident defendant within the statutory time, it was held that he was estopped to assert the delay as an objection to a removal. Judge Taft said:

"It has been several times decided by the supreme court that the time for removing the case fixed by the statute is not indispensable to the jurisdiction of the federal court, but that it may be waived by the consent and acquiescence of the parties, and that a party may be estopped by his conduct to allege it as an objection to removal."

The Supreme Court of the United States, in Ayres *v.* Watson, 113 U. S. 594, had before it the question whether a party might waive a delay or be estopped from objecting that the steps for removal had not been taken within the prescribed time, and it was held that diverse citizenship and some other grounds were jurisdictional and absolutely essential, but that the time of applying for a removal and the proffer of a bond were modal and formal and might be waived either expressly or by implication. In speaking of the time of application for a removal, Justice Bradley said: "It does not belong to the essence of the thing. It is not in its nature a jurisdictional matter, but a mere rule of limitation," and so the doctrine of estoppel was applied.

125 The subject was again considered in Northern Pacific Railroad *v.* Austin, 135 U. S. 315, where the court remarked:

"As the time within which a removal must be applied for is not jurisdictional, but modal and formal, (Ayres *v.* Watson, 113 U. S. 594), it may, though obligatory to a certain extent, be waived. And as where a removal is effected the party who obtains it is estopped upon the question of the time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to time could not be raised by him."

The question came before the court in the latter case of Martin *v.* Baltimore & Ohio Railway Co., 151 U. S. 673, and the court in commenting on the decision in the Ayres case noted the fact that the estoppel was applied to the removing party, but decided that it was applicable to either party, and remarked that the decision in that case has never been doubted or qualified. In speaking of Justice Bradley's decision, it was said that:

"His whole course of reasoning leads up to the conclusion that the time of removal, not being a jurisdictional and essential fact, is a subject of waiver and of estoppel alike."

In Connell *v.* Smiley, 156 U. S. 334, Chief Justice Fuller said:

"Whether the petition for removal was filed in time it is immaterial to consider, as neither Tenney nor Lay, who petitioned for removal nor Connell, who consented as a party and participated as their attorney, can now raise the objection."

In Danvers Savings Bank *v.* Thompson, 133 Mass. 182, a petition

for removal was denied because one of the defendants was a citizen of the same state as the plaintiff. Later it was made to appear that this defendant had released all his interest in the subject-matter of the suit before the decision on the petition for removal had been made. This fact was not known at the time to the non-resident defendant, and although known by the plaintiff he did not disclose the fact. A rehearing of the petition for removal was asked for and obtained. The court said:

126 "The defendant Thompson filed his petition for removal in due time. At the time it was filed he was entitled upon the real facts of the case to invoke the jurisdiction of the federal courts, he and the plaintiff being citizens of different states. The concealment by the plaintiff of a vital fact ought not to prejudice the defendant. It was a fraud upon him and upon the court.

"We are of the opinion that upon the discovery of the real facts the defendant became entitled to a rehearing upon his petition for removal, and that the former rescript and order should be vacated and set aside."

See, also, Powers *v.* Chesapeake & Ohio Railway, 169 U. S. 92, 99; Church *v.* Church, 80 N. Y. Suppl. 770.

If the estoppel were overlooked, the objection to removal should nevertheless be overruled. The failure to petition for removal at or before the time for answer does not necessarily preclude a removal. It is enough that it is asked for as early as the record in a case or the acts of the parties show it to be removable. A discovery that an honest mistake as to parties had been made, an increase in the demand for judgment, the dismissal of a defendant, or the amendment or filing of a pleading disclosing that the case is a removable one, will justify an order of removal if upon the disclosure a party promptly files his petition.

In Powers *v.* Chesapeake & Ohio Railway, 169 U. S. 92, where a second petition for removal had been filed, it was said that the provision as to the time for filing a petition for removal could not be literally applied; that to do so would be inconsistent with the statute, and utterly to defeat all right of removal in many cases. It was said:

"The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and

127 to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought."

See, also, Guarantee Co. of North Dakota *v.* Hanway, (C. C. A.) 104 Fed. 369.

When the first petition for removal was filed the fraudulent purpose and conspiracy of Weldon and Fritzlen to defeat the jurisdiction of the federal court and to prevent the litigation of the bank's controversy with Fritzlen in that court, were not apparent. The

only sources of information were the averments of Weldon's pet
tion that the note sued on and to secure which the mortgages wer
given was payable within ten days and the fact that the action wa
instituted on the note and mortgages eleven days after they matured
These facts taken in connection with others which occurred sub
sequently point to the fraudulent purpose, but, standing alone
they were not sufficient to charge the bank with notice of the fraud
ulent scheme nor to put it upon inquiry. The bank did not know
from Weldon's petition what course the Fritzlens would pursue.
could not know that D. G. Fritzlen would practically admit Weldon
claim, nor that he would join him in asserting that its note and
mortgages were void, nor yet that he would endeavor to litigate with
the bank in that action any claim he had against it. If the bank had
ventured to allege a fraudulent conspiracy to evade federal jurisdic
tion of a controversy between it and Fritzlen—a violent supposition
since there was then no such controversy—how could it have been
proven? Fritzlen might have responded, "I have not questioned
your note and mortgages, nor indicated a purpose to contest them
with you in the Weldon or any other suit. Why should you impute
fraud to me merely because Weldon holds or claims to hold past-due
paper against me upon which he has brought suit?" And Weldon
most assuredly would not have divulged the fraudulent purpose of his
action. So at the time the bank filed its first petition for removal
the record in the case did not show the case to be removable.

128 But when Weldon's reply and the answer and cross-peti
tion of D. G. Fritzlen were filed—both of which were filed on
the same day and attacked the validity of the bank's note and mort
gages on the same ground—the conspiracy and fraudulent purpose
of Weldon and Fritzlen were uncovered and the record revealed Wel
don's action to be fictitious and without merit. Within a few days
thereafter the bank filed its second petition for removal, upon the
ground of diversity of citizenship, charging the fraud as disclosed
by the record. As an excuse for not filing its second petition im
mediately the bank states therein that it did not learn of the filing of
these pleadings until June 4, 1904, nine days after they were filed,
and further alleged that: "The defendant Boatmens Bank further
avers and states that the defendant Fritzlens herein were and have
been in default from the time of the institution of this suit until the
filing of said separate answer herein by and with the consent, con
nivance and collusion of the plaintiff herein, and that by agreement
between plaintiff and defendant Fritzlens the said separate answer
of D. G. Fritzlen was withheld and not filed until after the re
manding of this cause on the first petition filed by this petitioner
as to prevent it being made to appear while this action was pending
on said former petition in the United States Court that this suit was
maintained for the fraudulent purposes aforesaid, and that the
controversies herein were wholly between citizens of different states.
It therefore clearly appears that the bank was diligent and filed its
second petition for removal as soon as the record showed the case
to be a removable one.

But there is an additional reason why the second petition for re

moval should have been allowed, which is, that it was filed within the time in which the bank was required to plead to Fritzlen's answer and cross-petition. Admitting the allegations of the second petition for removal to be true, as we have assumed throughout, Weldon was not a real party in the action and should be eliminated therefrom. The only real controversy, then, was between Fritzlen and the Bank.

129 Fritzlen's answer and cross-petition, the first pleading filed as between him and the bank, attacked the validity of the note and mortgages held by it and asked to have them adjudged void, and then set up the counterclaims upon which a judgment for money was asked. The bank took the negative side of these propositions in considering an application for removal, the court may inquire into the nature of the controversy and the interests of the various parties, and arrange them on the record according to their interests without regard to the positions assigned to them by the pleader.

(Removal Cases, *supra;*
Pacific Railway Co. *v.* Ketchum, 101 U. S. 289, 298;
Evers *v.* Watson, 156 U. S. 527, 532;
Dawson *v.* Columbia Trust Co., 197 U. S. 178;
Black's Dillon on Removal of Causes, sec. 90.)

Within the rule stated, the Fritzlens should be treated as plaintiffs and the bank as a defendant. Treating Fritzlen's pleading then as an initial one, the bank's second petition for removal, having been filed before it was required to answer, was in time.

It follows that the ruling denying the second petition for removal and holding the case for trial was erroneous, and for that reason the judgment will be reversed.

All the justices concurring.

A true copy.

Attest:

____ ____,
Clerk Supreme Court.

130 In the Supreme Court of Kansas.

BOATMENS BANK, Plaintiff in Error,
vs.
D. G. FRITZLEN, EDAN P. FRITZLEN, and W. H. WELDON, Defendant- in Error.

This is to certify that the above named Court in its consideration, decision and judgment in the above entitled *cuase* reviewed only that portion of the record of the proceedings of the District Court of Clark County, Kansas from whence this proceeding in error was brought which related to the pleadings of the above named parties filed prior to the filing of the second petition for removal filed in said district court by the plaintiff in error herein on June 10, 1904, the order of said district court denying said petition for removal and the final judgment of said district court; and, that the sole question con-

sidered and decided by this court in this proceeding in error was whether on the face of the record made by such pleadings, including said petition for removal the jurisdiction of said district court was ousted, and jurisdiction of this cause conferred upon the Circuit Court of the United States for the District of Kansas, sitting in the second judicial division of said State and District. It is further certified hereby that the foregoing transcript contains all of the pleadings, orders, motions and petitions made and entered by said District court which were by this court considered in arriving at its decisions, judgment and mandate.

In witness where-, I, W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, have hereunto set my hand at Topeka, Kansas, this May 24, 1907.

W. A. JOHNSTON,
Chief Justice of the State of Kansas.

131 In the Supreme Court of Kansas.

BOATMENS' BANK, Plaintiff in Error,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and W. H. WELDON, Defendants in Error.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas do hereby certify that the foregoing transcript contains full true and correct copies of that portion of the record and case-made filed in the above entitled cause up to and including the petition for removal filed by the plaintiff in error in the trial court on June 10, 1904, and including the order of the said trial court denying said petition for removal and the final judgment of the trial court herein.

I further certify that the foregoing transcript contains full true and correct copies of all of the motions, pleadings, orders decisions and judgment made and entered in the above entitled cause in this court.

In witness whereof I have hereunto signed my name at my office in the city of Topeka, Kansas, this May 25th 1907 and have affixed hereto the seal of the Supreme Court of Kansas.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

132 Hereafter follows the petition for writ of error and assignment of errors, the order allowing the writ of error and copy of the bond, the writ of error and the allowance thereof and the citation, together with the proof of service thereof.

133 In the Supreme Court of Kansas.

BOATMENS' BANK, Plaintiff in Error,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and W. H. WELDON,
Defendants in Error.

Petition for Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Kansas in rendering judgment against them in the above entitled cause on April 6, 1907, the said defendants in error, D. G. Fritzlen, Edna P. Fritzlen and W. H. Weldon hereby pray a writ of error from the said decision and judgment to the Supreme Court of the United States. The said defendants in error herewith present their assignment of errors upon which they will rely for a reversal of the said decision and judgment.

H. J. BONE AND D. R. HITE,
Attorneys for D. G. Fritzlen and Edna P. Fritzlen.
FRANCIS C. PRICE,
Attorney for W. H. Weldon.

STATE OF KANSAS, *Supreme Court, ss:*

Let the writ of error issue upon the execution of bond by the said defendants in error, D. G. Fritzlen, Edna P. Fritzlen and W. H. Weldon in the sum of Two Thousand dollars; said bond when approved to act as a supersedeas.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

134 In the Supreme Court of the State of Kansas.

BOATMENS' BANK, Plaintiff in Error,
vs.
D. G. FRITZLEN, EDNA P. FRITZLEN, and W. H. WELDON,

Assignment of Errors.

The above named defendants in error file herewith their petition for a writ of error to the Supreme Court of the United States, and say that there is error in the record and proceedings of the above named Court in the above entitled cause, and for the purpose of reversing the judgment of the said Court entered on April 6, 1907, ask a review of the said record and proceedings, and that for such reversal said defendants will rely upon the following assignment of errors, to-wit:

I.

The said Court erred in failing to give full faith and credit to the judgment and order of the Circuit Court of the United States for

the District of Kansas entered on April 2, 1904, remanding this cause to the district court of Clark County, Kansas, and denied to the defendants in error aforesaid the right given to them by the act of Congress relating to the remanding causes from a federal to a state court.

II.

The said Court erred in holding and deciding that the said petition for removal filed by the plaintiff in error in said state court on June 10, 1904, was sufficient to confer jurisdiction on the said Circuit Court of the United States notwithstanding the remand of this case by said Circuit Court.

III.

The said Court erred in holding and deciding that the said
135 second petition for removal so filed by the plaintiff in error showed that the defendant W. H. Weldon was a sham party to this cause.

IV.

The said Court erred in holding and deciding that the allegations contained in the said second petition for removal raised the issue of fact that the defendant in error W. H. Weldon had no cause of action against the defendants D. G. Fritzlen and Edna P. Fritzlen.

V.

The said Court erred in failing to hold and decide that the said second petition for removal showed on its face that the said plaintiff in error so filing said petitoin for removal admitted that the defendant in error W. H. Weldon had a valid cause of action against the defendants in error D. G. and Edna P. Fritzlen.

VI.

The said Court erred in holding and deciding that said second petition for removal showed there was no controversy between the defendant in error W. H. Weldon and the defendants in error D. G. and Edna P. Fritzlen.

VII.

The said Court erred in failing to give the effect to the ruling and judgment of the United States Circuit Court for the District of Kansas second division, remanding this cause for trial in the said state court.

VIII.

Said Court erred in f-iling to give effect to the fact that the said plaintiff in error before it filed said second petition for the removal of this cause had filed in this cause its answer setting up facts which if unchallenged would result in fastening upon the real and personal property upon which the defendant in error W. H. Weldon

held *and* lien, and which was owned by the defendants in error D. G. Fritzlen and Edan P. Fritzlen.

136 IX.

The said Court erred in failing to give due force and effect to the order of the United States Circuit Court for the District of Kansas remanding this cause for trial in the state court, and in failing to give due effect to the laws of Congress in such cases made and provided.

X.

The said Court erred in holding and deciding that the answer of the defendant in error D. G. Fritzlen responsive to the answer of the plaintiff in error Boatmens Bank was effectual to give the plaintiff in error a right to remove this cause from the said state court to the United States Circuit Court for the District of Kansas.

XI.

The said Court erred in failing to give effect to the fact shown by the record that the defendant in error W. H. Weldon had in no wise changed his position or pleadings since the ruling and judgment of the United States Circuit Court remanding this cause to the said state court; and said Court erroneously held that the mere fact that a co-defendant filed an answer setting up matter of defense and counterclaim against the attack of another defendant was sufficient to set aside a judgment and ruling of the Circuit Court of the United States that this cause was not — removal at the petition of the said plaintiff in error.

XII.

The said Court in failing to hold and decide that the said second petition for removal filed by the said plaintiff in error in the trial court did not state facts sufficient to entitle*d* the said plaintiff in error to remov*ae* this cause.

XIII.

The said Court erred *erred* in holding and deciding that a petition for removal filed after answer by a co-defendant setting up a cause of action against another defendant was filed in time within the meaning of the laws of Congress in such cases provided.

137 XIV.

The said Court erroneously held and decided that the record in the above entitled case as it existed at the time of the filing of the said second petition for removal disclosed a controversy of which the United States Circuit Court for the District of Kansas had or could have had jurisdiction.

XV.

The said Court erroneously held and decided that the record in said cause showed that the only real controversy was between the defendant in error D. G. Fritzlen and said Boatmens' Bank; whereas said Court should have held and determined that by the decision and judgment of the Circuit Court of the United States on the first petition for removal it was conclusively settled and determined that a controversy existed between the defendant in error W. H. Weldon and the defendants in error D. G. Fritzlen and Edna P. Fritzlen for the foreclosure of liens on property owned and in the possession of the said Fritzlens; and, that the pleadings in said cause had not been changed in any manner until after the filing by the said Bank of an answer wherein said Bank asserted the amount, nature and validity of certain mortgages on said property.

XVI.

The said Court erred in failing to properly apply the provisions of the Acts of Congress relating to the jurisdiction of the courts of the United States to the facts disclosed by the record in this case in this, that said Court erroneously held and decided that a suit of a civil nature which could not have been or-ginally commenced in a circuit court of the United States because of a plain absence of requisite diversity of citizenship of necessary parties, could be removed into a circuit court of the United States by a defendant, who was a non resident of the state where such suit was brought.

XVII.

The said Court erroneously held and decided that the motive of a plaintiff having a valid cause of action against a citizen of his own state could be enquired into for the purpose of removal
138 of a suit commenced by such plaintiff in the only court open to him, to-wit a state court, to a circuit court of the United States.

XVIII.

The said Court erroneously held and decided that the said second petition for removal so filed by the said Boatmens' Bank on June 10, 1904 contained allegations from which it appeared that the defendant in error had no cause of action against the defendants in error D. G. and Edna P. Fritzlen, whereas the allegations of said second petition for removal merely states that said Bank has no interest in the note and mor*g*gages executed by the said Fritzlens to the said Weldon, and no where alleges that said note was not a valid obligation of the said Fritzlens and no where alleges that said mortgages are not valid liens on the property mentioned therein.

XIX.

The said Court erroneously held and decided that the fact that the answer of the said Fritzlen to the petition of the said Weldon

was delayed was a circumstance to be considered as showing fraud on the part of these defendants in error, whereas said court should have held and decided that the record plainly showed that this cause had been retained by the Circuit Court of the United States for the District of Kansas from September 1903 to April 2, 1904 when it was remanded to the said state court, and that said Bank itself was in default of an answer to the said petition, and that the answer of the said Fritzlen was filed within the time required by law after the filing by the said Bank of an answer in said cause setting up the asserting liens against the property of the said Fritzlen and claiming that the same were paramount to the liens of the said Weldon.

XX.

The said Court failed to give effect to the fact that in the answer filed in said Cause by the said Bank the execution, validity and amount of the note and mortgages asserted by the defendant in error W. H. Weldon were admitted by the said Bank by a failure to deny the same as required by the laws of the State of Kansas.

139 XXI.

The said Court erred in reversing the judgment rendered by the district court of Clark County Kansas in favor of the defendants in error D. G. Fritzlen on the ground that said state court had no jurisdiction to render said judgment by reason of the provisions of the acts of Congress relating to the removal of causes from a state to a federal court.

XXII.

Said Court Erred in reversing the findings conclusions and judgment of the said state court in favor of the defendant in error W. H. Weldon on the ground that the record showed that under the laws of the United States relating to the removal of causes this case had been removed to the Circuit Court of the United States for the District of Kansas, Second Division.

XXIII.

Said Court erred in stating as a fact established by the record, that "Fritzlen's answer and cross petition, the first pleading filed as between him and the bank attacked the validity of the note and mortgages held by it and asked to have them adjudged void, and then set up the counter claims upon which judgment for money was asked." When the record plainly showed that the answer filed by the said Fritzlen was directly responsive to the answer filed by the said Bank, and that if the said Fritzlen had not set up matters of defense to the note and mortgages set out by the said Bank in its answer in this suit he would have been estopped by a decree in this suit that the note and mortgages of the said Bank were valid liens on his property.

XXIV.

The said Court erroneously held and decided that this case was ruled by decisions of the United States Supreme Court relating to actions brought by a plaintiff jointly against two or more defendants one of whom was a citizen of the same state as the plaintiff, when in fact the plaintiff had no cause of action against the resident defendant and fraudulently joined such resident defendant for the purpose of defeating a removal of the cause to the federal
140 court; when the record plainly disclosed that the Circuit Court of the United States for the Second Division of the District of Kansas had ruled and adjudged that this was an action to foreclose mortgages on real and personal property to which the owner of such property in possession was a necessary party, and that the contention of the defendant Bank that its liens were prior and superior to the liens asserted in the plaintiffs' petition could not alter the fact that the case disclosed but one controversy to all parties of which the resident defendants were indispensible parties; and when the said record further disclosed that the only change made in the situation of the parties to the suit had been brought about by the assertion by the non-resident defendant in its answer of the priority and amount and validity of liens held by it as valid and superior liens on the property of the said resident defendants.

XXV.

That said Court erroneously held and decided that the statute of the United States relating to the removal of causes from state to federal courts applied in cases where a defendant set up a counter-claim against his co-defendant growing out of the subject matter of the suit; and that by setting up such counter claims by such resident defendant a suit not otherwise removable became subject to removal at the petition of the co-defendant against whom such counter claims were alleged.

XXVI.

The said Court erred in holding and deciding that a suit not originally cognizable in a federal court could be removed to such court.

XXVII.

The said Court erred in holding that where a non-resident defendant mortgagee sets up his liens, and the owner of the property sets up in answer thereto that such liens are void, and also that the said non resident mortgagee is indebted to the mortgagor by reason of breaches of contract, that in such case the court may rearrange the parties to such suit and place the resident defendant on
141 the same side of the suit as the plaintiff who brought the suit to foreclose a junior (in time) mortgage on the same property; when the record plainly showed that this precise question had been litigated between the said non-resident mortgagee and the resident plaintiff before the Circuit Court of the United States for the district of Kansas, second division, and had been decided against the

claim of the non-resident defendant mortgagee that in such case a right of removal existed by a possible re-arrangement of parties.

XXVIII.

The said Court erred in refusing to hold and decide that the right of removal can not rest upon the pleading of a co-defendant, but must be determined from the case made by the plaintiff in his petition.

XXIX.

The said Court erred in holding and deciding that in the state of the record the Fritzlens must be treated as plaintiffs and the said Boatmens Bank as a defendant.

XXX.

The said Court erred in first holding and deciding that Weldon had no cause of action against the said Fritzlens and then holding and deciding that the record showed this was a suit by the Fritzlens against the Bank; when there is nothing in the record as made by the pleadings of the parties inclusing the petition for removal upon which to base such a conclusion, and on the contrary the pleadings inclusing the answer of the said Bank and its said petition for removal showed that Weldon had a v-lid cause of action against the said Fritzlens for a pre-existing debt to which the said Fritzlens had no defense.

XXXI.

The said Court erred in holding and deciding that because a necessary party defendant has no defense to a *cuase* of action set out in a plaintiff's petition that therefore no controversy within the meaning of the acts of Congress relating to removal of causes exists between such plaintiff and defendant.

142 To the end that the foregoing Assignment of Errors may be and appear of record the said defendants in error, D. G. Fritzlen, Edna P. Fritzlen and W. H. Weldon present the same to the Honorable Supreme Court of the State of Kansas, and pray that such disposition be made thereof as may be in accordance with law and with the statutes of the United States in such cases made and provided. The said defendants further, most respectfully pray that for the said errors the judgment of the above named court in the above entitled cause be reversed and that a judgment be entered by the Supreme Court of the United States that the District Court of Clark County, Kansas had jurisdiction of the said cause and that the same was not ousted by the pretended proceedings for a removal of this suit to the Circuit Court of the United States for the District of Kansas, and for such other relief as may be proper and lawful.

H. J. BONE &
D. R. HITE,
Attorneys for D. G. and Edna P. Fritzlen.
FRANCIS C. PRICE,
Attorney for W. H. Weldon.

143 Supreme Court of the United States.

D. G. FRITZLEN, EDNA P. FRITZLEN, and W. H. WELDON, Plaintiffs in Error,
vs.
BOATMENS' BANK, Defendant in Error.

Bond.

(Copy.)

Know all men by these presents, That we, D. G. Fritzlen, Edna P. Fritzlen and W. H. Weldon, as principals and The United States Fidelity & Guaranty Company of Baltimore, Md. as surety are held and firmly bound unto the Boatmens' Bank, of St. Louis Mo. in the sum of Two Thousand dollars, to be paid to the said Boatmens' Bank, to which payment well and truly to be made we bind ourselves jointly and severally, firmly by these presents.

Signed and sealed with our hands and seals and dated this May 23, 1907.

Whereas, the above named plaintiffs in error seek to prosecute their writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Kansas.

Now Therefore, The condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

D. G. FRITZLEN,
EDNA P. FRITZLEN,
W. H. WELDON,
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By W. S. McCLINTOCK, *Att'y in Fact,*
By FRANK DAVIS, *Att'y in Fact.*

The above bond is approved.

W. A. JOHNSTON,
Chief Justice of the State of Kansas.

[Endorsed:] 14884 D. G. Fritzlen *et al. v.* Boatmens' Bank. Bond. Filed May 25 1907. D. A. Valentine, Clerk Supreme Court.

144 The original of the foregoing bond was lodged with the clerk of the supreme court of the state of Kansas on May 25th 1907 and the following indorsement made thereon.

14884, D. G. Fritzlen *et al. v.* Boatmen's Bank, Bond. Filed May 25th 1907 D. A. Valentine, Clerk supreme court.

145 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of the State of Kansas:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said supreme court of Kansas, before you, at the April 1907 sitting of the January term, 1907, thereof, between The Boatmen's Bank plaintiff in error *versus* D. J. Fritzlen, *et al.* defendants in error, a manifest error hath happened, to the great damage of the said defendants in error, D. J. Fritzlen, Edna P. Fritzlen and W. H. Weldon as by their complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington D. C. and filed in the office of the clerk of the United States Supreme Court, on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this May 23rd 1907.

Done in the city of Topeka, with the seal of the Circuit court of the United States for the District of Kansas attached.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARITT,
Clerk Circuit Court United States,
District of Kansas.

Allowed:
W. A. JOHNSTON,
Chief Justice of the Supreme Court
of the State of Kansas.

[Endorsed:] Writ of Error. Filed May 25 1907 D. A. Valentine, Clerk Supreme Court.

146 The original of the foregoing writ of error was lodged with the clerk of the supreme court of the state of Kansas on May 25th. 1907 and also at the same time and place a copy thereof for the defendant in error the Boatmen's Bank one of said copies being addressed personally to the said defendant in error. The following endorsement was made upon said original writ and upon each copy. Writ of error, Filed May 25th. 1907.

147 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Boatmens' Bank, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Kansas, wherein D. G. Fritzlen, Edan P. Fritzlen and W. H. Weldon are plaintiffs in error and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Kansas, this May 25th 1907.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

Attest:
D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

We, Botsford Deatherage & Young attorneys of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearence in the Supreme Court of the United States.

May 27 1907.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Boatmens' Bank.

148 UNITED STATES OF AMERICA, *ss:*

Supreme Court of Kansas.

In obedience to the commands of the within writ, I herewith transmit to the supreme court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same, under the certificate of the Hon. Wm. A. Johnston Chief Justice of this court.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, in the city of Topeka, this 25th day of May 1907.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

149 In the Supreme Court of Kansas, October Term, 1907.

No. 345.

D. G. FRITZLEN ET AL., Plaintiffs in Error,
vs.
BOATMENS BANK, Defendant in Error.

Stipulation.

It is agreed by the above parties that the copy of the testimony of D. G. Fritzlen, followed by the remarks of Mr. Hite and a copy of the instructions to the jury, as certified by the annexed certificate of the Clerk of the Supreme Court of Kansas of date the 24th day of April, 1908, with the seal of said Supreme Court thereto affixed, are true copies of the portions of the record in said Supreme Court of Kansas in said case of Boatmens Bank *v.* D. G. Fritzlen *et al.*, at the pages thereof indicated in the said certificate of said Clerk of the Kansas Supreme Court; and it is further agreed that said portions of the record in said cause so certified by the said Clerk of said Kansas Supreme Court shall be deemed and taken to be and are hereby made a part of the record in this cause in this court, the same and with the same effect as if said portions of the record had been so certified as a part of the record herein in the first instance, or certified by the said Clerk of the Kansas Supreme Court in obedience to a writ of certiorari herein.

Dated April 27, 1908.

JAMES G. BOTSFORD,
BUCKNER F. DEATHERAGE AND
ODUS G. YOUNG,
Att'ys for Def'd'ts in Error.
H. J. BONE AND
D. R. HITE,
Att'ys for Plaintiffs in Error.

150 *Testimony of D. G. Fritzlen.*

Direct examination by Mr. HITE:

Q. Mr. Fritzlen you are one of the defendants in this suit?
A. Yes, sir.
Q. Mr. Fritzlen did you have any transaction with Mr. Allen wherein you borrowed any money from him?
A. Yes sir, I did.
Q. What Mr. Allen is that?
A. Mr. John Allen who lives here in Ashland.
Q. How much money did you borrow from him?
A. Twenty-five hundred dollars.
Q. Did you give him a note for that?
A. Yes, sir.

Q. Have you that note?
A. No sir.
Q. What was the rate of interest in the note?
A. Ten per cent.
Q. What was that money borrowed for, Mr. Fritzlen?
A. Why, to pay expenses on the ranch.
Q. Did you give Mr. Allen any further security than your own note?
A. Yes sir.
Q. What was that?
A. Mr. Weldon.
Q. He signed the note with you?
A. Yes sir, endorsed it.
Q. State when that transaction took place?
A. Well, I had thought that it took place in '98, along in the fall of '98, but after talking with Mr. Allen I guess I may be mistaken for he says it was in '97, along in April, '97.

(Case Made, Weldon *v.* Fritzlen *et al.*, No. 14884, pp. 292, 293.)

Immediately following said testimony appears the following:
"By Mr. HITE: I would say to your Honor that we have examined this question very carefully. The note has been lost. Mr. Fritzlen thought it was in '98, but upon examination Mr. Fritzlen finds that Mr. Weldon was not here in '98, therefore the defense is not well taken, and the verdict of the jury ought to be for the plaintiff for the amount of the note."

151 At pages 841 to 853 of the Case Made appears the following charge of the District Court to the jury, viz:

"In the District Court of Clark County, Kansas.

"W. H. WELDON, Plaintiff,
vs.
"D. G. FRITZLEN, EDNA P. FRITZLEN, and THE BOATMENS BANK, Defendants.

Instructions to the Jury.

"GENTLEMEN OF THE JURY:

"This is a civil action instituted, in the first instance, by W. H. Weldon against D. G. Fritzlen and Edna P. Fritzlen and the Boatmens Bank as defendants. Mr. Weldon sues to recover upon a note for the sum of $3,750.00 executed by D. G. Fritzlen and Edna P. Fritzlen, and payment secured by a chattel mortgage upon certain personal property and also by a real estate mortgage upon certain real property. This action is brought by Mr. Weldon for the purpose of recovering upon said promissory note and to determine the priority and validity of other liens upon said property and to foreclose said mortgages. The Boatmens Bank has been made a defendant in this

action under an allegation that it has or claims to have a certain chattel mortgage and a certain real estate mortgage covering the same property as that included in the mortgages of plaintiff.

'Under the law it is proper to try a portion of the questions arisin this case by a jury and other portions by the court, and only ortion of the controversy in this case is submitted to you for your ermination. That portion of the case which has been submitted ou may be, for the purpose of your convenience and for the conience of the court in instructing you, divided into two parts or isions:

'First, the determination between Weldon as plaintiff, and D. G. Edna P. Fritzlen as defendants, of the amount due upon the note sued upon in this action by said plaintiff; second, the trial of a se of action for damages in which D. G. Fritzlen sues his coendant, the Boatmens Bank. This cause of action is based upon alleged breach of contract to furnish feed for the defendant zlen's live stock.

You have been selected to try the questions of fact that have arisen veen the parties above mentioned in each of said controversies, you are instructed that you are the sole and exclusive judges of questions of fact that have arisen upon the pleadings and the ence in this case as to the matters which are submitted to you for rmination, and you are to determine all questions of fact that e been submitted to you from the evidence as you have heard it the witness stand and under the guidance of these instruc-

Division One.

. You are instructed that as to the question of the amount due D. G. Fritzlen and Edna P. Fritzlen to W. H. Weldon, that, r the pleadings and the evidence in this case, you must find a verfor the plaintiff, W. H. Weldon, and against D. G. Fritzlen and P. Fritzlen, for the sum of $3,750.00, with interest thereon the second day of July, 1903, at the rate of 10 per cent. per m to the present date.

Division Two.

. In a pleading filed in this action in the nature of a cross-petition against his co-defendant, Boatmens Bank, the defendant Fritzlen sets out a claim or cause of action against said Bank for damages for an alleged breach of contract to furnish feed is live stock in the winter of 1902-3. The material allegations ritzlen's cause of action are as follows:

st. That during the year 1898 the Boatmens Bank employed ohn H. Pinnell as its agent at the Kansas City Stock Yards to re loans on live stock and other property belonging to citizens e State of Kansas, and that said Pinnell was duly authorized to id represent said bank in all matters relating to its said business e state of Kansas.

d. That prior to 1898 and since that time defendant Fritzlen

has been engaged in the business of buying cattle and other live stock, and preparing them for market and selling the same; that during the year 1898 he conducted a considerable portion of his business through a certain partnership doing business under the firm name of Elmore & Cooper; that he became indebted to said Elmore & Cooper in a considerable sum of money represented by certain promissory notes executed in favor of said Elmore & Cooper by said Fritzlen; that said Boatmens Bank, prior to November, 1901, became the owner of said notes, that the amount due on said notes on November 30th, 1901, was about $19,000; that said notes had been transferred to said bank by the Elmore & Cooper Live Stock Commission Company; that said commission company, prior to November 30th, 1901, had failed; that on or about November 30th, 1901, the said Pinnell and defendant Fritzlen met and effected an understanding and arrangement whereby the defendant Fritzlen executed a note in renewal of the said original note, to Elmore & Cooper Live Stock Commission Company, and said defendant Fritzlen and wife executed to said Pinnell, for said bank, a chattel mortgage upon certain personal property and also a real estate mortgage upon certain real property in Clark County, Kansas, which note and mortgage are set out in this case.

"3rd. That at said time the said Pinnell, on behalf of said defendant bank, agreed that if the defendant, Fritzlen would give
154 the bank said real estate mortgage in addition to the renewal of the chattel mortgage securing the original note, the said bank would furnish to the defendant whatever feed would be necessary to safely and properly care for said live stock described in said chattel mortgage, the cost of said feed to be charged to the defendant Fritzlen and the payment thereof secured by said real estate mortgage, and in addition to furnishing such necessary feed, the said bank would pay to defendant Fritzlen the sum of $30 per month until said live stock was ready and marketed; that the expenditure by said bank thus to be made constituted the sole consideration for the execution by defendant Fritzlen of said real estate mortgage, the personal property described in the chattel mortgage and then on the ranch being abundantly sufficient in value to satisfy the amount of said note.

"4th. That in the autumn of 1902 it was duly arranged between one G. M. Smith, who had succeeded said Pinnell as the agent of said bank, and in pursuance of said arrangement made with said Pinnell, that the said live stock should be wintered on said Fritzlen's ranch in Clark County, and that said bank would ship the necessary feed to care for the same during the winter of 1902-3; that the defendant Fritzlen relied upon said promise and kept said stock on said ranch; that during January, 1903, defendant Fritzlen demanded feed for said cattle and the same was again promised, but that the said bank failed and neglected to send the same; that said bank was notified of the necessity of said feed and so misled the defendant by its repeated promises through said Pinnell and Smith with reference thereto; that defendant Fritzlen constantly expected said feed and did not procure the same from other sources.

"5th. That at the time of the execution of said real estate mortgage, the said Pinnell was fully acquainted by the defendant, Fritzlen, of his financial resources, and informed that the principal motive of defendant in giving the excess security of the real estate mortgage was to insure an abundant supply of feed for the large herd of live stock covered by the chattel mortgage, and was further informed
155 that the placing of record of the real estate mortgage would operate to deprive defendant Fritzlen of credit for the purchase of feed, and that said defendant would rely upon said bank to furnish said feed as the same was required.

"6th. That by reason of the bank's failure to furnish said feed, more than five hundred of defendant's cattle starved to death and were wholly lost to defendant; that the value of personal property described in the chattel mortgage after the winter of 1902 and 1903 was twenty thousand dollars less than the value would have been had said live stock been properly fed through said winter; that said 500 cattle that starved to death were worth not less than fifteen thousand dollars, and that the remainder of the herd were so reduced as to make them unmarketable and decreased in value to the amount of not less than five thousand dollars.

"7th. That if the necessary feed had been furnished to the defendant Fritzlen at his ranch at the time requested, and as required under the terms of the agreement with said bank, said cattle would have gone through the winter with but trifling loss, and that said loss was due to the failure, neglect and refusal of said bank to faithfully perform said contract.

"3. The bank has made a general denial of each and all the material allegations of the defendant Fritzlen's claim against it, and by this denial has put the said Fritzlen upon his proof as to each and every one of said material allegations; that is, the burden of proof is cast upon said Fritzlen to prove each and every material allegation of his claim or cause of action against the bank, and before he can recover in this case he must maintain each and every material allegation of his cause of action by a preponderance of the evidence.

"4. In this action the defendant Fritzlen seeks to recover what are known to the law as special damages. The damages claimed by him, to-wit, compensation for the loss by death of cattle and the depreciation in value of the remainder are not the ordinary, natural and probable results of the breach of a contract to furnish feed for live stock,
156 but such damages are extraordinary and special in their character, and cannot be recovered unless facts and circumstances have been proven, from which it can be reasonably supposed that such damages were in the contemplation of both parties at the time they made the contract, as a probable result of the breach of it. It is the claim of the defendant Fritzlen that a large number of said cattle were starved to death and the others greatly depreciated in value because of the alleged failure of the bank to furnish feed for same when necessary, and because said Fritzlen could not obtain feed for said cattle, first, because there was no sufficient feed in the vicinity of his ranch that could be purchased, and second, that on account of giving said mortgages to secure the payment of the note to

the bank dated November 30, 1901, said Fritzlen was deprived of credit and could not purchase feed for said cattle.

"You are instructed that before said Fritzlen can recover in this action any portion of the damages claimed, it must appear from the evidence by a preponderance thereof, that at the time of the making of the contract with the bank to furnish feed, if any such contract was, in fact, made, that said bank was informed by said Fritzlen that no feed could be obtained in the vicinity of said ranch with which to feed said cattle in the event of the failure of the bank to furnish it or that said Fritzlen, after the execution of the said mortgages to the bank would have no credit and could not buy feed for said cattle, and that it is reasonably to be supposed that with such information imparted to the bank, it had in contemplation at the time of the making of the contract to furnish feed, that a failure to furnish it according to the terms of the contract would probably result in the death of the cattle and a shrinking in value of the survivors. There is no evidence in the case that said Fritzlen ever communicated to the bank that there was no feed that could be obtained in the vicinity of said Fritzlen's ranch, and you are therefore instructed that that fact, if it has been proven, cannot be considered by you as against said bank in estimating damages in this case, if you find that there was a breach of contract, as claimed by said Fritzlen.

157 "5. It devolves upon the defendant Fritzlen to prove in this case, by a preponderance of the evidence:

"1st. That a contract to furnish feed for his cattle included in and covered by the chattel mortgage to the bank, when necessary for their use, was actually made with him by said bank for a valuable consideration.

"2nd. That at the time of making of said contract, he communicated to said bank, through its officers or agents, the fact that by reason of the giving of the mortgage on the real estate that he would be unable to get feed from others, and that he would rely upon said bank to furnish said feed as required.

"3rd. That in the winter of 1902 and 1903, and during the life of said contract, he notified said bank of an approaching necessity of feed for said cattle in time for said bank to furnish the same by prompt action.

"4th. That said bank failed and neglected, within a reasonable time after notice, that feed was required to furnish the same.

"5th. That because of lack of credit, owing to the giving of said real estate mortgage, defendant Fritzlen was unable to obtain feed for said cattle and prevent loss.

"6th. That owing to the failure of the bank to furnish feed as required by its contract, numbers of the cattle covered by the bank's chattel mortgage died and the survivors were reduced in weight and depreciated in value.

"7th. The defendant Fritzlen must prove to a reasonable certainty the number of cattle, covered by said mortgage that starved to death as a result of the failure to furnish feed under the contract, and for which he claims compensation, and the market value of the same in Clark County immediately previous to the time that they began to

suffer for feed, and also the extent and amount of the depreciation in value of the survivors on account of the failure or neglect to furnish feed under the contract. This paragraph gives you the correct measure of damages in the event you find that said Fritzlen is entitled to recover in this case on this cause of action.

158 "6. You are instructed that if you find, from the evidence, that a contract to furnish feed was made as alleged by defendant Fritzlen that the damages that may be awarded to him, in the event of a breach of said contract, can only be those that were within the contemplation of the parties at the time of the making of the contract, as heretofore stated, and such only as would ordinarily result from a breach of the contract under the special circumstances communicated, if any were communicated, at the time of the making of the contract, and such damages only can be awarded as were the natural and proximate results of such breach of contract under such special circumstances. The breach of the contract to furnish feed under the special circumstances communicated at the time of the making of the contract must have been the natural and proximate cause of the injury.

"The term 'natural,' as applied to the consequences of an act, properly implies that they are such as might reasonably have been foreseen, or such as occur according to the ordinary course of events under the circumstances surrounded and connected with the act.

"The term 'proximate' indicates nearness, and in the law requires that there should be no other culpable and efficient agency intervening between the defendant's act and the loss.

"7. You are instructed that if the contract to furnish feed was made as claimed by said Fritzlen, then it was his duty to notify said bank or its agent having charge of its business in connection with said contract of any approaching necessity for said feed far enough in advance for said bank, by prompt action, to furnish such feed and that after such notice was given it would then be the luty of said bank to act with reasonable promptness and furnish said feed delivered on or near said ranch, as might be arranged between the parties. It would be the duty of the bank, upon receipt of such notice, to promptly buy, or to have bought for it, the kind of feed agreed upon by the parties at a reasonably convenient place where such feed could be obtained, and then to promptly deliver or have such feed

59 promptly delivered, at or near said ranch, as arra-ged between the parties. Under such a contract as is claimed by said Fritzlen to have been entered into, the bank would be entitled to a reasonable time, after notice of an existing or imminent necessity for feed, in which to furnish the same; that is, such time as would be required and would be used by an ordinarily prudent and careful man acting under similar circumstances in a matter in which he was personally interested, and until the expiration of such reasonable time after notice, no damages resulting from an absence of feed could be charged against said bank.

"8. In determining whether the failure or neglect of said bank to perform the alleged agreement (if you find said agreement was made as alleged, and that there was a failure to perform as alleged)

was the natural and proximate cause of the injury sustained by Fritzlen, you are instructed that if, from the evidence, you find that any other sufficient cause, not contemplated by the parties at the time this alleged agreement was made, intervened between the time of the failure of said bank to perform the alleged agreement and the injury complained of, such injury must be attributed to such intervening cause, and defendant Fritzlen cannot recover. You are instructed that the first efficient and adequate cause of an injury, as well as every intermediate cause necessarily following from the first cause, is the proximate cause of the injury, unless some new cause independent of the first cause, shall intervene between the first cause and final injurious result. Any number of causes may intervene between a breach of an agreement and the final injurious consequences, and if they are such as might have been reasonably contemplated by the parties at the time of making the agreement, the last result, as well as the first and every intermediate result, is to be considered as the natural and proximate result of the breach of the agreement. But whenever a new cause intervenes which is not a consequence of the first wrongful breach or act, which is not under the control of the party failing to perform his contract, and which was not within the contemplation of the parties at the time the agreement was
160 entered into, and except for which the final injurious consequence is too remote to constitute the basis of a recovery.

"9. It is in evidence that a snow storm occurred in the latter part of February and first of March, 1903, during and immediately following which a large number of said cattle died and others were injured. It is claimed by the bank that said storm was unusually severe, one not at all common to the country, or to be reasonably anticipated by one acquainted with the usual conditions of the weather in Clark County during those months. You are instructed that the bank cannot be held responsible for loss caused to said Fritzlen through death and injury to his cattle by such storm if such storm was the efficient and producing cause of the death of and injury to said cattle, even though there was failure to furnish feed according to contract. As to loss suffered because of cattle that died from the effects of said storm, or whose depreciation in value was caused by the effects of said storm, and whose deaths and injuries cannot be directly traced to a failure to furnish feed according to said alleged contract as the natural and proximate cause, the bank can, under no circumstances, be held responsible in this action, nor can the bank be held responsible for loss or injury resulting from any cause whatever except those that were the natural and proximate results of the breach of said contract, if you find that said contract was made and a breach thereof occurred.

"10. You are instructed that if no contract was made to furnish feed for the consideration stated in the cross-petition of said Fritzlen, and that the bank entered into no contract to furnish feed as alleged and claimed by said Fritzlen, but that, being desirous of furnishing feed for the purpose of protecting its own interests in said cattle, it, at the suggestion of said Fritzlen, in January, 1903, that feed was necessary or would soon be necessary, informed said Fritzlen that it

ould send him a quantity of cottonseed cake to Kingsdown, Kansas,
be fed to said cattle, the actual cost only of said feed to be charged
to said Fritzlen, and said bank did not agree to deliver the
61 same at any certain time, or prohibit him from obtaining it
from others; under such circumstances the said bank cannot
e held responsible in damages for any loss caused by failure to de-
ver said feed promptly after notice of its necessity or before the
me that it was needed to feed said cattle.

"12. You are instructed that by a preponderance of the evidence is
eant the greater weight of the evidence, and that a preponderance
f the evidence is not alone determined by the number of witnesses
stifying to a particular fact or state of facts. In determining upon
hich side of an issue involved in a civil action the preponderance of
e evidence is, the jury should take into consideration the oppor-
nity of the several witnesses for seeing and knowing the things
out which they testify, their conduct and demeanor while testify-
g, their interest or lack of interest, if any, in the result of the suit,
e probability or improbability of the truth of their several state-
ents in view of all the other facts and circumstances proved on the
ial, and from all these circumstances determine upon which side
such issue is the weight or preponderance of the evidence.

"You are instructed that where the evidence upon an issue or ques-
on involved in a case preponderates, however slightly, in favor of
e party upon whom is cast the burden of proof, that upon that ques-
on or issue the jury must find in favor of the party upon whom
e burden of proof is cast, but if the evidence is equally balanced
preponderates in favor of the other party, then as to the question
issue, the decision of the jury must be in favor of such other
rty.

"13. The court instructs the jury that you are the sole judges of
e credibility of the witnesses and the weight that is to be attached
the testimony of each and all of them, and you are not bound to
ke the testimony of any witness as absolutely true, and you should
t do so if you are satisfied, from all the facts and circumstances
oved on the trial, that such witness was mistaken in the matters
tified to by him, or that for any other reason his testimony is
untrue or unreliable. If you are convinced, by the evidence,
2 that any witness has willfully and corruptly testified falsely
as to any matter or thing material to the issues in this case,
u are at liberty to disregard all of the testimony of such witness,
t whether or not you will do so is a matter resting entirely with
u. You are not compelled to reject all the testimony of such wit-
ss, but may and should consider such portions of it as you find to
worthy of credit, and give it such weight as you believe it entitled
and considering all the facts and circumstances of the case.

"In determining the weight that is to be given to the testimony
the different witnesses in this case, the jury are authorized to con-
er the relationship of the witnesses to the parties, if the same is
oved, their interest, if any, in the event of the suit, their temper,
ling or bias, if any has been shown, their demeanor while testify-
g, their apparent intelligence and their means of information, and

give such credit to the testimony of each witness as, under all the circumstances, such witness seems to be entitled to.

"14. The court instructs you that the argument of counsel is for the purpose of assisting you in a fair consideration of the evidence of this case, to assist you in making a proper analysis of the same in order that you may arrive at a proper verdict in this case, and it is your duty to give counsel close attention during the argument of this case and to carefully consider such proper matters as they may say for your consideration. You are instructed that it is not proper for counsel, in the argument of the case, to state any matters or things bearing upon the questions of fact and claimed to be within his own personal knowledge, or which may have been stated to him by others not witnesses in the case and who have not testified before you, and you should disregard all such statements, if they are made, and make up the verdict on the evidence actually given in this case without placing any reliance upon, or giving any credit to, any statements of counsel not supported by the evidence. Should counsel, in the heat of argument, misquote or misstate the evidence for any
163 reason, it will be your duty to disregard such mis-statement and to remember that it is your duty to depend upon your own memory as to what the evidence in this case actually is.

"15. After the argument of counsel, you will retire to your jury room in charge of a sworn officer of the court. Your first duty will be to elect a foreman. You will then proceed to deliberate upon your verdict in the case. Your verdict must be a unanimous one upon each of the divisions of this case submitted to you. You cannot return a verdict or a decision of an agreement to disagree. When you have arrived at a unanimous verdict, you will inform the officer in charge, who will, in turn, inform the court.

"E. H. MADISON, *Judge.*

(Endorsed:) 1769. Weldon *v.* Fritzlen, *et al.* Instruction to jury. Filed May 6, 1905. W. L. Ainsworth, Clerk."

164 In the Supreme Court of the State of Kansas.

BOATMENS BANK, Plaintiff in Error,
vs.
D. G. FRITZLEN ET AL., Defendants in Error.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a true and correct copy of the evidence of D. G. Fritzlen contained on pages 292 and 293 of the original record in the above entitled cause on file in my office; that the language thereafter, commencing with the words "By Mr. Hite" and ending with the words, "for the amount of the note" is contained in said record and immediately following said testimony of D. G. Fritzlen, and that the same is a correct copy of said remarks of Mr. Hite contained in said original record, and that the instructions of the District Court of Clark County, Kansas to the jury in said cause following said remarks, are a true copy of said

instructions to the jury as contained in said record at pages 841 to 853 thereof, said original record being on file in my office.

In witness whereof, I have hereunto affixed my hand and seal at my office in the City of Topeka, Kansas, this 24th day of April, 1908.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court.

165 [Endorsed:] No. 345. 20748 D. G. Fritzlen, *et al.*, Plaintiffs in Error, *vs.* Boatmens Bank, Defendant in Error. Transcript of Record and Stipulation.

166 [Endorsed:] File No. 20,748. Supreme Court U. S. October Term, 1907. Term No. 345. D. G. Fritzlen *et al.*, Pl'ffs in Error, *vs.* The Boatmen's Bank. Stipulation of counsel & addition to record. Filed May 11th, 1908.

Endorsed on cover: File No. 20,748. Kansas supreme court. Term No. 99. D. G. Fritzlen, Edna P. Fritzlen, and W. H. Weldon, plaintiffs in error, *vs.* The Boatmen's Bank. Filed May 31st, 1907. File No. 20,748.

Office Supreme Court, U. S.
FILED.
OCT 16 1908
JAMES H. McKENNEY,
CLERK.

In the Supreme Court
OF THE UNITED STATES.

W. H. WELDON, D. G. FRITZLEN AND EDNA P. FRITZLEN, *Plaintiffs in Error,*
vs.
BOATMEN'S BANK, *Defendant in Error.*

OCTOBER TERM, 1908.
No. 99.

Brief and Argument of Plaintiff in Error.

H. J. BONE,
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OCTOBER, 1908.

CRANE & CO., TOPEKA.

In the Supreme Court
OF THE UNITED STATES.

W. H. WELDON, D. G. FRITZLEN AND EDNA P. FRITZLEN, *Plaintiffs in Error,*
vs.
BOATMEN'S BANK, *Defendant in Error.*

Specifications of Error, Brief and Argument in Behalf of the Plaintiffs in Error.

STATEMENT OF THE CASE.

ON July 23, 1903, W. H. Weldon filed in the District Court of Clark county, Kansas, a court of original general jurisdiction, his petition against D. G. Fritzlen, Edna P. Fritzlen and The Boatmen's Bank, wherein he alleged that the Fritzlens were indebted to him in the sum of $3750, evidenced by their promissory note, dated July 2, 1903, payable ten days after date, and secured by two certain mortgages covering real and personal property in their possession, situated in Clark county, Kansas; that the Boatmen's Bank

was a corporation organized under the laws of the State of Missouri relating to State banks, and having its principal office in St. Louis; that the Boatmen's Bank claimed a lien upon all of the property covered by the mortgage held by the plaintiff Weldon to secure a note executed by D. G. Fritzlen; that whatever interest the bank had grew out of certain transactions which the plaintiff alleged to be wholly illegal and void, and that the note held by the Bank, as well as the mortgages securing it, were wholly illegal and void; that the Bank, claiming to be the owner of the legal title to the personal property covered by the mortgage, was about to take possession of the same and convert it to its own use, to the injury of the plaintiff; that whatever claim, right, title or interest the Bank had, or claimed to have, in or to the personal and real property described in his mortgages, were junior, inferior and subordinate to his mortgages, interest and liens. The prayer of Weldon's petition is for a personal judgment against the Fritzlens for the amount of his note, with interest; that his mortgages be declared to be a lien upon the property covered thereby, and that so much thereof as might be necessary to satisfy the debt evidenced by his note should be sold and his debt be paid out of the proceeds; and that the pretended claim, lien and interest of the Bank be adjudged illegal and void; and for other relief. (This

petition appears on pages 12, 13, and 14 of the printed transcript.) On the same day F. C. Price, Esq., attorney for Weldon, filed his affidavit in the cause, setting out the nature of the action brought by Mr. Weldon, the property which it covered, and that the Bank was not a citizen or resident of the State of Kansas and personal service could not be made upon it. Thereupon, on July 23, 1903, notice of service of summons by publication was duly published, requiring the Bank to answer this petition on or before September 4, 1903. (Rec., 14, 15.)

On July 30, 1903, a summons was issued for the defendant Bank, and was served on August 3, 1903, on one C. Lukens, an employé of the Bank then transacting business for his employer in Clark county, Kansas. (Rec., p. 22.) This summons so served required the Bank to answer Weldon's petition on or before August 31, 1903.

On July 30, 1903, the plaintiff Weldon filed his application for a temporary injunction to restrain the Bank, as well as the Fritzlens, from removing any of the personal property covered by his mortgage out of the county (Record, pp. 22 and 23); and the Judge of the District Court being absent from Clark county, application was made to the Probate Court, a court of record of that county having jurisdiction in such cases, for a restraining order, which on July 30 was granted by the Probate Judge, to be effective pending the hear-

ing and determination of the application for a temporary injunction. (Record, pp. 24, 25.)

On August 13, 1903, the defendant Bank demurred to Weldon's petition, on the grounds that several causes of action were improperly joined and that the petition did not state facts sufficient to constitute a cause of action, in this, "that said petition does not "state any fact or circumstances showing the prior "mortgage of said Boatmen's Bank to be invalid." (Rec., 26.)

On the same day, to wit, August 13, 1903, the defendant Bank filed its petition for a removal of the cause to the Circuit Court of the United States for the District of Kansas. (Record, pp. 26, 27, 28.) In this petition it is alleged that the controversy in the action as to whether the mortgages of the plaintiff or the mortgages of the Bank are prior liens, is a separable controversy wholly between the plaintiff, a resident and citizen of Kansas, and the Boatmen's Bank, a resident and citizen of Missouri, and that such controversy could be fully determined as between the plaintiff and The Boatmen's Bank, without the presence of the defendant Fritzlen. And as a second ground for removal, that, by reason of prejudice against the Boatmen's Bank and the local influence of the plaintiff Weldon and of the defendants Fritzlen, the Bank would not be able to obtain justice in the District Court of

Clark county, and that the Bank did not have the right under the laws of Kansas to remove the cause to some other county on account of such prejudice and local influence. Accompanying this petition for removal was a good and sufficient bond. Sometime prior to September 14, 1903, the Boatmen's Bank filed in the Circuit Court of the United States for the District of Kansas a full transcript of the proceedings in the cause, including its petition for removal and bond. On Sept. 14, 1903, motions to remand filed by the Fritzlens and also by Weldon, came on to be heard, and were denied by the Circuit Court; and on the same day that court dissolved the restraining order granted by the Probate Judge, and directed that Weldon recast his pleadings so as to conform to the practice in the courts of the United States. (Rec., 30, 31.)

These orders of the Circuit Court were transmitted to the State court and became of record therein on September 17, 1903. (Rec., 31.)

On April 2, 1904, the Circuit Court of the United States for the District of Kansas duly entered an order that Weldon's motion to remand the cause to the State court, from whence it came, be sustained, and on April 5, 1904, a duly certified copy of such order sustaining the motion to remand was filed in the District Court of Clark county, Kansas, in the original action. (Rec., 33.)

On May 14, 1904, the Boatmen's Bank filed in the State court its answer to Weldon's petition. (Rec., 34.) In this answer the Bank denies generally the allegations of the plaintiff's petition; and alleges that it is the owner and holder of mortgages executed by the defendant D. G. Fritzlen, on November 30, 1901, covering the property described in the mortgages set out in the plaintiff's petition and securing his note for $32,920.15, executed the same day, payable at the office of the Bank in St. Louis, Missouri, eleven months after date, with interest at 8 per cent after maturity; and that the Bank, by virtue of such note and mortgages, had a right, title, liens and claim to and upon the property, paramount to any right, title, lien or claim of the plaintiff. The prayer of the answer is as follows:

"Wherefore, having fully answered said Boatmen's Bank, prays judgment, and that it may go hence without day, with its costs laid out and expended."

Copies of the note and mortgages, referred to, are attached to the answer.

On May 23, 1904, the defendants Fritzlen filed their application for an order of restitution (Rec., 42, 43, 44), in which they set out that pending the suit, the Boatmen's Bank had caused to be taken and carried out of Clark county, substantially all of the personal property covered by the chattel mortgage given to the plaintiff Weldon; and on May 23, 1904, (Rec., 45, 46,) an order

was duly entered by the District Court of Clark county directing the Bank to restore the property which had been so taken, and in default thereof to deposit the amount of money received by the Bank from the sale of such property in a bank in Clark county.

On May 26, 1904, D. G. Fritzlen filed an answer, in which he admitted the execution of the notes and mortgages set out in Weldon's petition, but denied that the amount of the debt was as great as alleged. Responsive to the Bank's answer, Fritzlen alleged: That prior to 1898 he had been and still was engaged in the cattle business in Clark county, Kansas; that in the course of such business he had had certain dealings with a partnership at the Kansas City Stock Yards, known as Elmore & Cooper, in the course of which he had purchased and sold large numbers of cattle and other live-stock; that during the course of such transactions Elmore & Cooper charged him with a large amount of commissions for such sales and purchases of live-stock; that such commission charges were illegal in that Elmore & Cooper were transacting the business of live-stock commission merchants in the State of Kansas in violation of the criminal laws of that State; that in the year 1898 an indebtedness of the answering defendant to Elmore & Cooper (or their successor corporation) of about $19,000 was evidenced by his promissory note to that firm; that included in the note was about $3,000

of such illegal commissions so exacted in violation of the criminal laws of the State of Kansas; that such note was wholly illegal and unenforcible and was not negotiable; that the Boatmen's Bank acquired this note from Elmore & Cooper in such circumstances as to be chargeable with notice of its illegality; that after the Bank acquired the defendant's note from Elmore & Cooper the same became due, and thereupon the Bank procured Fritzlen to execute the note set out in the Bank's answer in renewal of the Elmore & Cooper illegal note; that the note to Elmore & Cooper was secured by a mortgage of personal property only, but that the Bank entered into an express agreement with Fritzlen that in consideration of the execution of a mortgage on the defendant's real estate the Bank engaged to furnish feed for defendant's cattle then on his ranch, and make necessary advances for ranch expenses; that the defendant and his wife, Edna P. Fritzlen, thereupon executed the real-estate mortgage set out in the Bank's answer; that the *sole consideration* for the execution of this real-estate mortgage was the promise and agreement of the Bank that it would supply feed for defendant's cattle and allow him funds for his ranch and personal expenses; that by the giving of such real-estate mortgage the defendant deprived himself of all means of obtaining credit, as thereby all of his remaining available property was pledged to the Bank; that the

personal security was at the time of the giving of these two mortgages abundantly sufficient to discharge the whole amount of the indebtedness, present and future, contemplated by the parties; that afterwards the Bank duly furnished supplies, money and feed to the defendant from time to time as the same became necessary, until the winter of 1902–1903; that in November, 1902, the answering defendant duly notified the Bank that feed would be urgently wanted for the cattle and live-stock for the approaching winter; that application was frequently made for this feed; that, disregarding its promises and agreements, the Bank negligently failed to furnish the necessary feed for defendant's cattle, and, as a direct consequence of such breach of the Bank's agreement, a large number of the cattle died, to the damage of the defendant in the sum of more than $20,000.

In this answer Fritzlen alleged also: That in July, 1903, after the beginning of the action, while he was in the peaceable possession of the cattle and live-stock described in the mortgages, and was duly observing the injunctional order of the court to keep said live-stock in Clark county, the Bank seized and carried away the greater portion of the live-stock, in violation of the restraining order of the court, and converted them to its own use; and that the defendant was thereby damaged to the amount of $25,000.

The prayer of Fritzlen's answer is, that the amount of his debt to Weldon be determined, and that he be given such time to pay as to the court may seem proper; that the notes set out in the Bank's answer be decreed to be illegal and wholly void, and that the chattel mortgage securing such note be also declared illegal and void; that an account be taken and stated between Fritzlen and the Bank, in which the Bank shall be charged with the damage to Fritzlen's cattle growing out of the failure of the Bank to furnish feed according to contract, and also, with the value of the live-stock so converted since the beginning of the action; and that the Bank be credited with all advancements made on account of the consideration of the real-estate mortgage; and, finally, that upon such accounting it be decreed that the real-estate mortgage is fully satisfied and does not constitute a lien on the defendant's real estate. The answer closes with a prayer for general relief.

On the same day (May 26, 1904) Weldon filed a reply to the Bank's answer, in which he denied the allegations relating to the note and mortgages; and alleged the illegality of the consideration of the note and mortgages securing it. (Rec., 53, 54.)

On May 31, 1904, the Bank obtained an order granting time for it to prepare a case-made for the Kansas Supreme Court to review an order entered by the court on May 23, 1904, directing a return of the property

taken during the pendency of the action. (Rec., 54, 55.)

On June 6th, 1904, the Bank filed its application to the court to set aside an order entered May 23, 1904, directing a return of the property taken by the Bank since the commencement of the action. (Rec., 55, 56.)

On June 10, 1904, the Bank filed its second petition for removal of the action to the Circuit Court of the United States for the District of Kansas. (Rec., 60, 61, 62.) The substance of this second petition for removal will be stated in the course of the argument.

On June 18, 1904, the defendant Bank filed its demurrer to the plaintiff's reply. (Rec., 63, 64.)

On June 18, 1904, the State court denied the second petition for removal, finding, however, that the bond filed in connection with such petition was sufficient. (Rec., 65.)

Afterwards the cause was duly tried in the District Court of Clark county, Kansas, and resulted in certain findings of fact made by the court, and certain judgments, which were removed to the Supreme Court of the State of Kansas for review by proceedings in error taken by the Boatmen's Bank and cross-proceedings in error taken by the plaintiff Weldon and the defendant Fritzlen. (Rec., 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.) Afterwards the Supreme Court of Kansas entered its conclusion and judgment, whereby it re-

versed the ruling and decision of the District Court of Clark county on the second petition of the Boatmen's Bank for a removal of the cause to the Circuit Court of the United States for this district, holding and deciding that the second petition for removal was sufficient, and that it should have been sustained by the trial court, and that the subsequent proceedings of the District Court of Clark county were without jurisdiction. (Rec., 82 to 93.)

The record taken by the parties to the Supreme Court of Kansas discloses the ruling, order and judgment of the Circuit Court of the United States of April 2, 1904, remanding the cause to the State court; and, upon the ground that the Supreme Court of Kansas failed to give due effect to this order remanding the cause so entered by the United States Circuit Court, the original plaintiff Weldon and the defendants Fritzlen have duly proceeded in this court by writ of error to the Supreme Court of Kansas; and the cause is now here for a reëxamination of the errors alleged to have been committed by the Supreme Court of Kansas in holding and deciding that the District Court of Clark county, Kansas, lost jurisdiction of the cause upon the filing of the second petition of removal presented to that court by the Boatmen's Bank, notwithstanding the order of the Circuit Court of the United States, dated April 2, 1904, sustaining the plaintiff's (Weldon's)

motion to remand the cause to the District Court of Clark county, Kansas.

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of Kansas erred in holding and deciding that the second petition for removal, filed by the Boatmen's Bank on June 14, 1904, should have been sustained; when the record showed that at the time such petition for removal was filed, no change in the cause of action or situation set out in the original petition filed by the plaintiff in the State court had taken place, and that no new grounds existed for filing such petition for removal.

II.

The Supreme Court of Kansas erred in failing to give full force and effect to the order of the Circuit Court of the United States of April 2, 1904, remanding the action to the State court; in this, that said Supreme Court failed to consider that the plaintiff Weldon was entitled to the full force and effect of such order so remanding the cause, notwithstanding any action taken in the State court by the defendant Fritzlen.

III.

The Supreme Court of Kansas erred in holding and deciding that the allegations of the second petition for removal, that the defendants Fritzlen had entered into a

collusive and fraudulent agreement with the plaintiff Weldon to prevent a removal of this cause to the Circuit Court of the United States, were sufficient to destroy the effect of the final order of the Federal court remanding the action, for that said petition for removal does not state facts sufficient to justify such a conclusion, nor any facts sufficient to destroy or impair the full force and effect of the final order of the Circuit Court of the United States remanding this cause to the State court.

IV.

That the Supreme Court of Kansas erred in holding and deciding that the answer filed by the defendant Fritzlen in the State court, responsive to the non-resident co-defendant's answer previously filed, constituted a sufficient ground for denying to the final order of the Circuit Court of the United States remanding said cause, the full force and effect to which, under the laws of the United States, such order remanding the cause was justly entitled.

ARGUMENT.

The first, second and fourth assignments of error present but a single question: Can a defendant in an action in a State court to foreclose mortgages on his property, by setting up matters of defense and counter-claim,—connected with the subject of the action,—against a non-resident co-defendant who is asserting rights against the mortgaged property, thereby give such non-resident co-defendant a right of removal notwithstanding a previous order of the United States Circuit Court remanding the action, where the original plaintiff in the action has neither changed his position nor amended his original petition or complaint?

The third specification of error relating to the allegation of fraud and collusion between the plaintiff and resident defendant will be considered separately.

From our statement of the case the court will perceive that this is an action commenced by Mr. Weldon, a citizen of Kansas, to recover a personal judgment against two citizens of the same State on account of their promissory note, and to foreclose mortgages executed by the makers of the note to secure its pay-

ment. This is the manifest object and purpose of the action. The joinder of the non-resident Bank is a mere incident to this principal purpose and object. In Kansas, where the formal distinctions between law and equity have been abandoned and a "reformed procedure" adopted, equitable as well as legal relief is secured by "civil action," in which the plaintiff's pleading, setting out his cause of action, is called a petition. In the present action, for the obvious purpose of securing full relief against the makers of his note and mortgages, the plaintiff, Weldon, made the Boatmen's Bank a party defendant by allegations that it claimed to have liens superior to his, but that, in fact, such pretended liens were wholly illegal and void; and, at all events, junior and inferior to those of the plaintiff.

Whatever may be the practice in other jurisdictions, it is well settled in Kansas that a mortgagee or other lien-holder, seeking to recover his debt and enforce his lien, is entitled to bring into his action for those purposes all persons having, or claiming to have, interests in and liens upon the property, and to litigate in a single action, the nature, extent and priority of all such interests and liens. This rule is so well settled that it is unnecessary to cite authority for its support. It is supposed to make for simplicity of procedure and to avoid a multiplicity of suits connected with the same

subject-matter. Weldon's action is of the kind well recognized by this rule. The non-resident Boatmen's Bank was brought into this action for the manifest purpose of requiring it, as a lien-holder, to litigate the nature, extent and priority of its alleged lien, to the end that the rights of all parties interested in the mortgaged property should be settled and a sale of the property accomplished which would be more likely to afford the plaintiff complete relief.

After the question of the jurisdiction of the United States court had been fully litigated and a final order entered remanding the cause to the State court and denying the jurisdiction of the Federal court, the non-resident Bank recognized and conformed to the settled rule of practice in the State court by filing its answer to Weldon's petition. This pleading of the non-resident lien-holder was filed *in the State court in this action*, on May 14, 1904. We consider the proper construction and effect of this pleading of great importance to an intelligent solution of the question before this court, and therefore take leave to here set it out in full:

IN THE DISTRICT COURT OF CLARK COUNTY, KANSAS.

W. H. Weldon, *Plaintiff*,

vs.

D. G. Fritzlen, Edna P. Fritzlen, and Boatmen's Bank, *Defendants*.

ANSWER.

And now at this day again comes said defendant, Boatmen's Bank, by its attorneys, and for answer to

the petition of plaintiff in the above-entitled action said Boatmen's Bank denies generally each and every allegation, averment and matter of whatsoever kind in the petition of plaintiff in the above-entitled cause contained.

Said defendant Boatmen's Bank states that it holds a chattel mortgage on all of the personal property described in the plaintiff's petition herein, which was executed by said defendant D. G. Fritzlen on November 30th, 1901, and that said chattel mortgage was recorded in the office of the Register of Deeds of said Clark county, Kansas, on December 6th, 1901. Said mortgage was made to secure the note hereinafter mentioned.

Said defendant Boatmen's Bank further states that it holds a mortgage covering said real estate described in plaintiff's petition herein, which was executed and delivered by said defendants D. G. Fritzlen and Edna P. Fritzlen on said November 30th, 1901, and that said last mortgage being by them duly acknowledged was recorded in the office of the Register of Deeds of said Clark county, Kansas, on December 6th, 1901, which said last mortgage was also executed, delivered and acknowledged and recorded for the purpose of securing said note hereinafter referred to; that said note which was so secured by said chattel mortgage and by said real-estate mortgage was executed and delivered on said November 30th, 1901, by said D. G. Fritzlen, payable to the order of John H. Pinnell, for the sum of $32,920.15, for value received, at the Boatmen's Bank, St. Louis, Missouri, with interest from date at the rate of 8% per annum until paid, and that by said note said D. G. Fritzlen promised to pay said sum eleven months after the date of said note, to wit, eleven months after November 30th, 1901, and that immediately upon the giving of said note said Pinnell, by endorsement on the

back of said note endorsed, sold and delivered said note to said Boatmen's Bank, and that said Bank has ever since been the owner and holder of said note and of said two mortgages given to secure the payment of the same.

Copies of said two mortgages and of said note are filed herewith, marked Exhibits A, B, and C.

Said Boatmen's Bank says that by virtue of said note and two mortgages the right, title, lien and claim of said Boatmen's Bank to said real and personal property described in plaintiff's petition is paramount to any right, title, lien or claim thereto of said plaintiff.

Wherefore, having fully answered, said Boatmen's Bank prays judgment, and that it may go hence without day, with its costs laid out and expended.

BOTSFORD, DEATHERAGE & YOUNG,
Attorneys for Defendant Boatmen's Bank.

EX. A.

[Copy.]

Collat. No. 5700 Transferred fro, B/B #93689. In payt. of Smith's draft attached as per his let. 2/20/02 filed with S. Harrison 96770 farm.

$32920.15. BUCKLIN, KAS., *Nov.* 30, 1901.

Eleven months after date I promise to pay to the order of John H. Pinnel, thirty two thousand, nine hundred twenty and 15/100 dollars. For value received at the Boatmen's Bank, St. Louis, Mo. with interest from date at the rate of eight per cent. per annum until paid.

D. G. FRITZLEN.

Received Nov. 18, 1902, $5281.50 on % of this note per G. M. Smith let. 11/17/02.

E. L. TAYLOR, *N. C.*

Pay to Order of Boatmen's Bank of St. Louis, Mo., without recourse.

JNO. H. PINNELL.

2411.15	
35334.30	
138.48	
35472.78	
5281.50	12/3/02
30165.27	
104.76	
30060.51	
7.33	
30050.18	
12.05	
30041.13	
11.50	
30029.63	

Due—
Nov. 2, 1902.

Copies of the mortgages referred to in the answer are attached to it as exhibits. They purport to convey, as security for the $32,920.15 note, substantially all the personal property mentioned in Weldon's mortgage, and what is known as the "Fritzlen's Ranch," described in the real-estate mortgage attached to Weldon's petition. Under the Kansas practice, where, by appropriate averments, a copy of a written contract is attached to a pleading, its execution and delivery is admitted

unless the party charged verifies his denial by affidavit; so that the Bank, by such allegations, intended to and did put in issue the nature, amount, character and validity of its debt and mortgage liens. Should an examination of this answer and the mortgages leave any doubt on this point, it is removed by the averments of the Bank's demurrer to Weldon's reply. (Rec., 63.) The second paragraph of this demurrer reads as follows:

"The matters contained and set up in the first paragraph of said reply do not, in law, prevent said Boatmen's Bank from defending this action, or from obtaining the judgment of this court *herein* upholding the mortgages of said defendant Boatmen's Bank as prior liens to the mortgages held by the plaintiff."

And the fifth paragraph:

"The matters set up in the third paragraph of said reply do not constitute any grounds of reply or defense on the part of plaintiff to the mortgages pleaded by said defendant Boatmen's Bank in its answer herein; and on the matters pleaded and contained in said third paragraph of said plaintiff's reply said defendant Boatmen's Bank is entitled to the judgment of the court upholding and maintaining its mortgages pleaded in its answer herein as valid prior securities to those held by the plaintiff."

And the seventh paragraph:

"On the matters pleaded and contained in said third paragraph said defendant Boatmen's Bank is entitled to defend this action and to have the judgment of the court sustaining its mortgages set up in its answer herein."

It is entirely clear, therefore, that the Bank's own construction and interpretation of its answer, shows it to be a pleading upon which, if the facts alleged were established on the trial, it would claim a valid judgment *in this action*, "sustaining the mortgages set up in the answer" "as valid prior securities" on Fritzlen's real and personal property.

Before we attempt a consideration of the questions growing out of the filing by the non-resident Bank of its second petition for the removal of this action, we shall take leave to consider the effect of this answer, under the statutes and decisions of Kansas, upon the rights and liabilities of the other parties to the action.

The final order of the United States Circuit Court remanding the action to the State court was entered on April 2, 1904. That is, forty-two days after the cause was remanded, the non-resident defendant, recognizing that the jurisdiction of the State court had been finally established, filed its pleading to the merits. Fritzlen's answer was filed on May 26, 1904, twelve days after the non-resident Bank's answer was filed; and the second petition for removal was filed on June 10, 1904, fifteen days after Fritzlen's answer was put in.

What was the effect of the Bank's answer on Fritzlen's rights? We can best answer this question by considering what would have been the result of a default by Fritzlen. If Fritzlen had filed no pleading

whatever, it is entirely clear that, so far as he is concerned, all of the allegations of the Bank's answer would have been taken as true and such judgment entered as the law applied to those facts would require. The facts thus established against Fritzlen would have been: First, that he had duly executed the note for $32,920.15 and the two mortgages on his real and personal property set out in the answer; (secondly) that the debt evidenced by the promissory note was due and unpaid; (thirdly) that the mortgages had been given for a valid and valuable consideration; and, (lastly) that the Bank was the owner and holder of the valid and subsisting mortgage liens on his real and personal property described in the mortgages set out in the answer, for the amount of the debt evidenced by the promissory note, with interest at the rate named therein. True it is sometimes insisted by our adversaries that the Bank by its answer did not pray for a decree enforcing its liens; and, upon this postulate, it is contended that therefore the Bank's answer did not invite the matters of defense set up in Fritzlen's answer; that substantially all of the allegations made by Fritzlen were wholly outside of any issue raised by the Bank's answer, and were mere voluntary averments having for their object the litigation of new and wholly foreign causes of action in which the plaintiff Weldon neither had nor could have any

direct interest whatever. In our opinion this postulate and contention are based upon a disregard of the plain intent and design of the Bank's pleading, and an utter misapprehension of its legal effect upon both Weldon and Fritzlen.

It is entirely true that the Bank did not specifically pray for a foreclosure of its liens. The language of its prayer is:

"Wherefore, having fully answered, said Boatmen's Bank prays judgment, and that it may go hence without day, with its costs laid out and expended."

We submit that this is equivalent to a prayer for general relief, and that the Bank would have been entitled to any judgment consistent with the case made against Fritzlen by the allegations of its pleading. That the prayer is no part of the answer is well settled, and it is authoritatively decided that a prayer quite as indefinite as this is equivalent to the more usual form for general relief. In *Moore v. Ogden*, 35 Ohio St., 430, a prayer "for all proper order and judgment in the premises," was held equivalent to a prayer for general relief. The rule is thus stated in 16 Am. & Eng. Ency. Pleading & Practice, 776:

"Although the codes, in enumerating the things which the plaintiff's complaint must contain, provide for a prayer for relief, yet strictly speaking the prayer is no part of the complaint, at least in so far as complaints are governed by the general rule of pleading

requiring the statement of a cause of action. The prayer is only a matter of form, and where a cause of action is stated cannot be reached by demurrer."

And page 810:

"By the code provisions or statutes of those states where the former practice has been superseded by the so-called reformed procedure, where an answer has been interposed the plaintiff is not confined in his relief to that prayed for, but may be permitted to take any judgment consistent with the case made by the complaint and embraced within the issues. The right to recover in such cases depends, not upon the prayer of the complaint, but upon the scope of that pleading and the issues made, or which might have been made, under it. The rule itself is no more than that recognized by courts of equity where general relief is prayed for."

See also *Foote v. Sprague*, 13 Kas. 155.
Hiatt v. Parker, 29 Kas. 765.

It is entirely clear, therefore, that when the Bank asked for "judgment *and* that it may go hence without day, with its costs," it asked for such judgment as would be consistent with the case made by its answer, and when Fritzlen answered this pleading he intended to contest the right of the Bank to have such a "judgment" against him.

He was the owner of the equity of redemption of the mortgaged property and in possession; he was, therefore, an indispensable party to any proceeding in which it was sought to fasten liens upon his property. He

was the maker of the notes held by both the plaintiff Weldon and the defendant Bank, and was, therefore, an indispensable party to any judgment fixing the amount of his debt to these adverse parties. The court was powerless to advance a single step in the direction of any decree fastening upon Fritzlen's property liens in any sum whatever, or adjudging the amount of any indebtedness against him, without his personal presence in the suit. Is it possible, then, to seriously contend that Fritzlen was unaffected by a pleading which, if ignored, would establish such facts against him and his property? We think not. Upon the filing of this answer by the Bank, Fritzlen was confronted by the necessity of either allowing the Bank to take judgment that it held valid liens against his property to the amount of more than $30,000, or, of responding to such pleading by setting up facts which he was advised constituted a defense to such indebtedness and such alleged liens. The cases on this point leave no room for doubt. It is a fundamental rule, supported by a legion of decided cases, that all necessary parties to a suit are bound to take notice of all issues, by whomsoever tendered, which affect their property rights. And it is the settled rule in chancery that adverse interests of co-defendants, necessary parties to the suit, may be passed upon and determined; and, that if a necessary party has an opportunity to be heard

and an opportunity to assert his rights and fails to assert them, he is concluded by the decree, whether the pleading of a co-defendant affecting his interests is in the form of a cross-petition, or otherwise.

In *Hapgood v. Ellis*, 7 N. W. Rep. 845, it is said:

"In a foreclosure suit where several parties are made defendants as lien-holders, subsequent purchasers, or lessees of the mortgaged premises, their several answers claiming rights as such lien-holders, subsequent purchasers and lessees may be regarded as cross-petitions for relief against their co-defendants as well as against the plaintiff; and if any such defendant, regularly served with process, fails to answer any material allegations contained in the answer of his co-defendant, he is bound thereby, as well as by the decree founded thereon, and unless he appeals therefrom, the same becomes, as to him, *res judicata*."

In *Corcoran v. Chesapeake etc. Ry. Co.*, 94 U. S. 741, Mr. Justice MILLER says of necessary parties in chancery suits:

"It has long been settled that adverse interests as between co-defendants may be passed upon and determined, and if the parties have a hearing and opportunity to assert their rights they are concluded by the decree as far as it affects rights presented to the court and passed upon by the decree."

In *Waldo v. Waldo*, 17 N. W. Rep. 709, the Supreme Court of Michigan said:

"It was competent for the court in that case, upon the pleadings and proof, to make a decree determining

and establishing the rights and interests of each of the parties without the necessity of a cross-bill or other proceeding for affirmative relief. The complainant was a necessary party to the first suit, and being such party, he was a party to every issue joined and litigated in it that could in any way affect his interest or his rights, and must be concluded by the decree upon those issues, and if he did not maintain his rights the decree is no less binding so long as he had the opportunity and neglected to do so."

In *National Bank v. Heller*, 50 Atl. Rep. 521–523, the Supreme Court of Maryland said:

"It was suggested that the rule establishing a *res adjudicata* should be limited in its application to the receivers and their sureties, and should not be extended to classes of creditors (parties to the suit), but we can, upon principle, see no satisfactory basis for such distinction, which is not recognized by any authority brought to our attention. On the contrary, it was considered and decided adversely to the contention of the appellees in *Corcoran v. Chesapeake Ry. Co.*, 94 U. S. 741, where it is said by Judge Miller, that in chancery suits it has long been settled that adverse rights as between co-defendants may be determined, and if the parties had an opportunity of asserting their rights, they are concluded by the decree so far as it affects rights presented to the court and passed upon by its decree."

In the case of *Louis v. Brown Township*, 109 U. S. 167, it appears that an action was brought by the owner and holder of bonds. To the petition the defendant filed a plea that in another action, wherein the as-

signor of plaintiff was defendant, it was determined that the bonds were illegal and that a mortgage securing them was also illegal. The plaintiff demurred to the plea, and the demurrer was overruled. After stating the foregoing facts, the Supreme Court of the United States, speaking through Mr. Justice MILLER, said (page 167):

"It is argued, in avoidance of this conclusion, that the board of trustees and Hopple being both defendants to Hipple's bill, no adversary contention on the question of the validity of the bonds could have taken place between them.

"But this view of the case ignores entirely the fact that Hopple, in filing his cross-bill seeking to establish the bonds as valid, became plaintiff, and made the trustee defendants, and in this manner presented the issue of their validity between himself and the trustees directly, and it was in express terms decided against him.

"*But if there had been no cross-bill, the fact that both Hopple and the trustees were placed as defendants in the suit of Hipple, does not impair the conclusive character of the decree in that case as between these parties.* The present case is precisely analogous to that of *Corcoran v. The Chesapeake and Ohio Canal Co.*, 94 U. S. 741, and we cannot better express our views of this case than by a quotation from the opinion in that:

"'It is said that Corcoran and his co-trustees, the Canal Co., and the State of Maryland, were all defendants to that suit, and that as between them no issue was by the pleadings on this question, and no adversary proceedings were had. The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary

parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their right, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree.'

"We are of the opinion that both demurrers were properly overruled."

Unless, therefore, this court is prepared to say that Fritzlen was not a necessary party to a suit in which the validity and extent of liens securing debts alleged to have been made by him, upon property of which he was the owner and in possession, then it must decide, that so far as the issues presented to the court by the Bank's answer affected his interests and rights in this property he would be bound by a determination of those issues, by whomsoever presented, for the simple and obvious reason that as to every one of such issues he was a necessary party. We suppose even our adversaries will admit, that a decree fixing upon Fritzlen's real and personal property a lien securing a debt for $32,920.15, affects his interests and rights in his own property. But if this is admitted, then it cannot be denied that unless Fritzlen was willing to be estopped by judgment, it was absolutely necessary for him *in this suit*, to answer the Bank's allegations by setting up such facts as would defeat its claims.

It is true that paragraph two of Fritzlen's answer begins by saying that it is a cause of action against his

co-defendant, but this is not material in determining whether, in this suit, Fritzlen had the right to defend against the Bank's alleged liens. It very frequently happens that a defense has all of the elements of a counterclaim, or cause of action, and still is but a defense to the co-defendant's cause of action.

But our adversaries insist that Fritzlen's answer asserted a new cause of action entirely foreign to that set out in the plaintiff's petition, and therefore a controversy was thus presented, on the one side of which was a Missouri corporation, and on the other side a citizen of Kansas. This argument again ignores the effect of the Bank's answer. It also ignores the fact that in this court the right of removal is to be determined by the statement the plaintiff makes of his own case in his own pleadings, and not by conditions injected into the case by the controversies raised between defendants by their pleadings. If it be admitted that Fritzlen's answer sets up matters wholly disconnected from the subject of the action as made by the plaintiff's petition, it does not help the Bank's argument, for notwithstanding the efforts of a defendant to change the character of the case, for all purposes of removal to the Federal court it remains as made by the plaintiff.

But there is no room for the contention that Fritzlen has set up new matter which does not "concern the subject of the action." We suppose it

will be admitted that this must be determined from the statutes and decisions of Kansas, for the all-sufficient reason that the Bank's answer preceded Fritzlen's pleading and was a clear recognition to and conformity with the rules of practice prevailing in the State court. We think it well settled by the statutes and decisions of Kansas, that the matters alleged in Fritzlen's answer did "concern the subject of the action" and were responsive to the allegations in the Bank's answer.

The paragraphs relating to the note and liens held by the Bank are the second, third, fourth, and fifth. These paragraphs will be treated in their order.

The substance of the allegations in the second paragraph, is:

(*a*) That Fritzlen was and had been for many years a cattle-man.

(*b*) That as such cattle-man he had considerable transactions with Elmore and Cooper and the Elmore & Cooper Live Stock Commission Company, a partnership and corporation, both members of the Kansas City Live Stock Exchange.

(*c*) That the Kansas City Live Stock Exchange was a trust within the meaning of the so-called anti-trust laws of the State of Kansas.

(*d*) That during the course of his transactions with these members of that trust, Fritzlen was charged about $3,000 as commission for the purchase and sale of live-stock.

(*e*) That in making the charges for commissions the members of this trust conformed to the trust agreement.

(*f*) That the commissions so charged in accordance with the trust agreement entered into and form a part of the consideration of certain notes given by Fritzlen to these members of the combination, which notes were not negotiable and which notes were acquired by the defendant Bank without the knowledge or consent of Fritzlen.

(*g*) That after the Bank acquired the notes containing these illegal commissions it procured Fritzlen to execute the note set out in the Bank's answer as a renewal in part of the note or notes given by Fritzlen to the members of the trust and containing the illegal commissions.

All of these facts were, of course, admitted by the Bank's second petition for removal, and the issue of law thus presented has been authoritatively passed upon by the Supreme Court and decided to be a complete answer and defense in any action where the validity of such a note and mortgages is drawn in question.

The case of *State of Kansas v. Charles L. Wilson,* (73 Kan. 334-343, and on rehearing pages 343 to 359) is instructive and conclusive on the point. It grew out of the following facts: Wilson was in possession of a lot of cattle which he sold to another, representing them

to be free of liens. A member of the Kansas City Live Stock Exchange had sold them to Wilson and took from him two notes, which included $201 of commissions exacted in violation of the statute to which Fritzlen appealed in this paragraph of his answer. The notes were not negotiable in form. To secure the debt evidenced by the notes, Wilson executed a chattel mortgage covering the cattle. The payee of the notes afterwards sold them and the mortgage to a bank in another city, which held them, unpaid and apparently in full force, at the time Wilson sold the cattle under the representation that they were free of incumbrances. Wilson was indicted for obtaining money under false pretenses, and defended on the ground that since the note and mortgage were void under the Kansas statutes, there was no misrepresentation, and therefore a conviction could not be sustained. The trial court declined to accept evidence in support of the defense, and Wilson was convicted and sentenced to the penitentiary. On appeal the Supreme Court affirmed the ruling of the lower court (this was the only question considered) in rejecting the offered evidence, but on rehearing changed the decision and reversed the judgment.

The court held as follows:

"An association of persons and corporations engaged in the business of buying and selling live-stock, and practically controlling that business at the place of operation, which has a by-law forbidding its members

to buy or sell live-stock for others without charging a commission therefor of at least fifty cents a head, is a combination to carry out restrictions in the full and free pursuit of a lawful business, and in virtue of that fact is a trust within the terms of chapter 265 of the Laws of 1897.

"The charging of a commission for services in the purchase of live-stock for another, by a member of such a trust, in pursuance of the by-law referred to, is an act made a misdemeanor by that statute, and a contract to pay commission exacted under such circumstances is void because made in violation of law.

"A note and mortgage given for a consideration, a part of which is unlawful because based upon a transaction made criminal by the statute, are wholly void. The language of the second paragraph of the syllabus in *Rathbone v. Boyd*, 30 Kan. 485, and of the corresponding portion of the opinion, is disapproved.

"Where two notes secured by a mortgage are given for a consideration in part unlawful, although the unlawful portion of the consideration is less than either of the notes, both of the notes and the mortgage are wholly void."

It would seem useless to contend, in the face of this decision of the highest court of this State, that where a mortgagee sets up a mortgage securing a note of which a part of the consideration is commissions charged by a member of the very same association with which the Supreme Court dealt in Wilson's case, the mortgagor, in possession of the mortgaged property, and an indispensable party to the suit in which such illegal note and mortgage are asserted, cannot set up the same

state of facts that Wilson successfully offered to establish that precisely similar securities were wholly void and unenforcible. It is too clear to require further argument, that the second paragraph of Fritzlen's answer was directly responsive to the allegations made by the Bank in its pleading, and not only concerned the subject-matter of the action, but constituted an absolutely conclusive defense against the enforcement of the note upon which the Bank relied to sustain its alleged lien.

The third paragraph of the answer alleges that the non-resident Bank had failed to comply with certain corporation laws of the State of Kansas, and therefore was not entitled to enter into a valid contract such as that evidenced by the mortgages set up in its answer. This was purely defensive matter, and properly set out. It directly affected the subject-matter of the action, and was directly responsive to the allegations in the Bank's answer that it was the owner and holder of a valid note secured by mortgages on Fritzlen's property.

The fourth paragraph of Fritzlen's answer sets out that by reason of the breach of contract to furnish feed for his cattle the Bank had become liable to Fritzlen in the sum of $25,000. This, of course, under the Kansas decisions, is a set-off.

In *Scantlin v. Allison*, 12 Kan. 85, a defendant answered admitting the execution of the notes set out in

plaintiff's petition, and set up that they were given as consideration for the purchase-price of property bought by him under covenants of warranty of which there had been a breach by the plaintiff. The Kansas Supreme Court determined that this answer consisted of an admission of the execution of the notes and a counter-claim for breach of warranty.

A somewhat similar question was before the Supreme Court of Kansas in the case of *Gardner v. Risher*, 35 Kan. 93. In that case a chattel mortgage had been executed to secure a note, and about the time of its execution and delivery the mortgagor and mortgagee entered into a contract by which the mortgagee agreed to furnish the mortgagor certain cattle to be pastured on the mortgagor's premises and to pay certain expenses connected therewith, including fifteen cents a head for herding the cattle. The mortgagee failed to perform his contract, and the mortgagor by such default suffered damages which he alleged amounted to $85. After the mortgagor had sustained this damage, the mortgagee seized the mortgaged property and sold it to another, who had knowledge of the foregoing facts. The mortgagor brought replevin and took the mortgaged property, claiming that he owed the mortgagee nothing; and that since the mortgage debt was satisfied, the property was taken without authority of law.

The Supreme Court held:

"Unliquidated damages arising from contract may

constitute a set-off against a note secured by a chattel mortgage; and if such unliquidated damages exceed the mortgage debt, the mortgagee is not entitled to the possession of the property described in the mortgage, as against the mortgagor asserting such unliquidated damages and pleading to same in an action founded upon the note and mortgage."

In the course of the opinion the Kansas Supreme Court, speaking through Mr. Chief Justice HORTON, said:

"The question in the case therefore is, whether Risher had the right to offset against the notes and mortgage the damages he claimed against L. We think he had the right to offset his damages, and that L. acted at his peril in taking the cow. The only claim he had to the cow was under the mortgage, and his interest in the property depended upon the amount due him from the mortgagor, after deducting all payments and legal offsets. . . .

"Gardner purchased the cow with notice of Risher's rights. His defense, or rather his claim, in the action was founded upon the notes and mortgage executed by Risher to L. If nothing was due upon the notes and mortgage, or if Risher had a valid offset to the same at the time L. took possession of the cow, then Gardner obtained no title or right thereto, if Risher's set-off was relied upon and pleaded by him in any action or proceeding founded upon the notes and mortgage."

This court had occasion to apply the above decision in *Clement v. Field*, 147 U. S. 467. That was a case commenced in a Kansas District Court and removed to the Circuit Court of the United States. It appears that the

plaintiffs brought an action for damages against the defendants for breach of warranty that a certain cane-mill would perform certain stipulated work. The defendants answered that theretofore they had commenced an action against the plaintiffs in the United States Court for the District of Kansas to recover $1450 secured by a mortgage on the cane-mill in question, and to foreclose such mortgage; that in such foreclosure suit the plaintiffs filed an answer alleging that the mortgagee had become liable for damages in respect of the mortgaged property in a sum greater than the amount of the notes secured by the mortgage, and asked that such damages be set off against the mortgaged note and that the plaintiffs have judgment for the balance. The answer further averred that the foreclosure suit was tried upon its merits and resulted in a verdict against the mortgagee for $1151.20, upon which judgment was duly entered.

The plaintiffs in the suit at bar in their reply admitted that such foreclosure suit had been brought and tried, but denied that they were permitted by the court to set up their claim for damages, and that such damages were not therein adjudicated.

The trial court decided that the plaintiffs had had a former recovery against the defendants upon the same cause of action, and that the judgment in the foreclosure suit constituted a complete bar to the present action and gave judgment to the defendants.

In this court it was argued that under the Kansas code damages caused by a breach of warranty could not legally be pleaded as a set-off in replevin to enforce a chattel mortgage, to which the court, speaking through Mr. Jusitce SHIRAS, said:

"The Supreme Court of Kansas disposed of this contention in *Gardner v. Risher*, 35 Kan. 93, which, like the present, was a case wherein the plaintiff sought, by a writ of replevin, to enforce the provisions of a chattel mortgage, and the defendant set off against the notes secured by the mortgage certain damages incurred by reason of breaches of a contract. The court held that, as the plaintiff's claim was really founded on contract, the defendant could . . . avail himself, by way of set-off, of damages caused by the failure of the other party to the chattel mortgage to comply with his contract."

This court held that the Circuit Court committed no error in holding that the plaintiffs in the damage suit were estopped by the verdict and judgment in the foreclosure suit.

In our opinion the force and effect of these decisions is conclusive against the contention of the Bank. Its answer set up its note and mortgages, and asked that they be adjudicated to be valid and subsisting liens against the property of the defendant Fritzlen. This paragraph of his answer is unmistakably within the decisions, and was undoubtedly correct pleading under the Kansas code. When the Bank filed its answer asserting

against its co-defendant a cause of action, it was bound to know that its adversary by his answer was entitled to set forth "as many grounds of defense, counter-claim, set-off, and for relief," as he might have "whether they be such as have been heretofore denominated legal or equitable, or both."

But little need be said concerning the fifth paragraph of the answer. From its allegations it appears that, at the commencement of the action, Weldon obtained a restraining order from the Probate Court preventing the Boatmen's Bank as well as Fritzlen from in any manner interfering with the live-stock covered by Weldon's mortgage; that, notwithstanding this restraining order, the Bank seized and carried away substantially all of the mortgaged live-stock and converted it to its own use; and that, in consequence, Fritzlen was prevented from asserting his rights of ownership in and to the live-stock, and therefore that he was entitled to have a recovery from the Bank for the value of such live-stock in the event the Bank's chattel mortgage was adjudged to be void.

It is entirely clear that this paragraph of the answer growing out of what is alleged to be a wrongful taking of the cattle by the Bank during the pendency of the suit, is merely ancillary to the principal matter in controversy. In the event the Bank's mortgage is ultimately decreed to be valid, then it would follow that

its seizure of the cattle was lawful; and, on the other hand, if the Bank had no valid lien upon the cattle, the money value of the live-stock will be substituted for the cattle, and the compensation recoverable by Fritzlen would be for the value of the cattle, in his possession under the restraining order. It seems to us, therefore, that this paragraph of the answer is a mere interlocutory matter that might have been asserted by motion. It certainly cannot avail the Bank as a ground of removal of the cause.

The position of our adversaries respecting this paragraph has always appeared to us to be rather peculiar. They admit that pending the suit in the State court they seized and carried away a part of the *res* to which the jurisdiction of the State court had attached, in violation of the express provisions of the restraining order. After they had thus secured the personal property, they attempt to base a right of removal to the Federal court upon the complaint made by the owner of the property against such action. In other words, having produced by their unlawful act a situation which deprived the owner of his property, they undertake to predicate a legal right upon his complaint to the court of the injury which they deliberately inflicted.

A PETITION FOR REMOVAL ON THE GROUND OF THE FRAUDULENT JOINDER OF A RESIDENT DEFENDANT, IS FATALLY DEFECTIVE IF IT FAILS TO ALLEGE FACTS SHOWING THAT THE PLAINTIFF HAS NO VALID CAUSE OF ACTION AGAINST THE RESIDENT DEFENDANT.

From the foregoing consideration of the situation of the case at the time the second petition for removal was filed on June 10, 1904, it clearly appears that after the remand of the case to the State court the non-resident defendant filed an answer setting up a defense and a counter-claim; that this counter-claim consisted of an assertion of liens against the property of the co-defendant Fritzlen; that responsive to this counter-claim Fritzlen answered, setting out matter of defense and of recoupment, and the plaintiff Weldon replied, with allegations tending to show that the liens asserted by the Bank were wholly illegal and void, and therefore were not either valid or prior liens upon Fritzlen's property and did not constitute lawful obstacles to the enforcement of Weldon's mortgages. We now come to a consideration of the allegations made by the non-resident defendant in this second petition for removal.

The decision of the Supreme Court of Kansas, after reciting that the non-resident defendant had filed a petition for removal on August 13, 1903; that both Weldon and Fritzlen filed motions to remand, which

were first denied and subsequently sustained on April 2, 1904, states (Rec., 84):

"On May 14, 1904, the bank filed an answer, which in effect denied the allegations of Weldon's petition, but asked for no affirmative relief."

This is the only reference in the opinion to this answer. We submit that the fundamental error of the Supreme Court rests upon its apparent failure to appreciate the effect upon Fritzlen's rights of the part of the Bank's answer which asserted the validity of Fritzlen's note and the lien securing the same, and asked for judgment. We respectfully submit that the Supreme Court of Kansas is mistaken when it states that by this answer the Bank did not ask for affirmative relief.

The Supreme Court then proceeds to a consideration of the allegations of the second petition for removal, and points out that this petition alleged: First, a separable controversy, and second, that the action was fraudulently brought by Weldon and Fritzlen to prevent a removal of the cause to the Federal court and to defeat the jurisdiction of the Federal court over the real controversy between the Bank and the Fritzlens. The court quotes the allegation which it is claimed shows that the action was fraudulently brought by Weldon and Fritzlen to prevent a removal. (Record, 84, 85.)

In the course of the opinion many cases are referred to by Mr. Chief Justice JOHNSTON of the Kansas Supreme Court as sustaining the proposition that where an action is commenced in a State court against a citizen of the same State as the plaintiff, and a citizen of another State, and it is shown by the petition for removal that the resident defendant was joined to prevent a removal, that such device will not be permitted by the Federal courts to prevent a removal of the cause. In this connection the case of *Wecker v. National Enameling Company*, 204 U. S. 176, is referred to in the following language (Rec., 87):

"In the more recent case of *Wecker v. National Enameling Co.*, 204 U. S. 176, the question of fraudulent joinder was brought directly before the Supreme Court of the United States. There Wecker, a citizen of Missouri, brought an action against a corporation, a citizen of New Jersey, for injuries alleged to have been occasioned through negligence. He joined with the corporation one Wettengal, a citizen of Missouri. In a petition for removal it was alleged that Wettengal was fraudulently joined as a defendant, for the purpose of fraudulently preventing, or attempting to prevent, the defendant from removing the cause to the United States Circuit Court, and that plaintiff well knew that Wettengal's relations to the corporation were not such as to make him liable, and that he was not joined in good faith, but to prevent a removal. An issue was formed on the motion to remand, but the Circuit Court found, on affidavits which were filed, that the joinder of Wettengal was palpably groundless and fictitious, and therefore denied the motion. The Supreme Court, on

review, held that the trial court was right in its conclusions that Wettengal was joined for the purpose of defeating the right of removal."

Mr. Chief Justice JOHNSTON adds:

"To the claim that there was no proof that Wecker knew of Wettengal's true relations to the defendant, and consequently that he could not be guilty of fraud in joining him, it was said that 'Even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach.'"

From the authorities cited the learned and eminent Chief Justice of the Kansas Supreme Court concludes that this court has determined: First, that the joinder of a resident defendant will not be permitted to deprive a non-resident defendant of the right of removal where such joinder is a fraudulent device to prevent such removal; and, second, that where the non-resident defendant, who petitions for removal, alleges that the resident defendant was joined for the fraudulent purpose of preventing removal, that, *prima facie*, such petition for removal is sufficient to oust the jurisdiction of the State court; and that the Federal court has exclusive jurisdiction to determine the fact whether such joinder was for such fraudulent purpose.

We not only agree that this is the rule settled by authoritative decisions of this court, but we admit that its enforcement is essential to the proper safeguarding

of the jurisdiction of the Federal courts; and if, from an examination of the allegations of the second petition for removal filed by the non-resident Bank, this court reaches the conclusion that the facts alleged, considered in connection with the state of the record at the time this petition for removal was filed, sufficiently show that a resident defendant was joined as a mere device for the purpose of preventing removal of the cause to the Federal court, the judgment of the Supreme Court of Kansas should be affirmed. But this does not mean that fraud is to be inferred from allegations of legal conclusions which a demurrer does not admit.

The petition for removal must be treated as a pleading; and, since no issue was taken by the adverse parties, its allegations are admitted precisely as though a demurrer had been filed by them and sustained by the trial court. In these circumstances we contend that, where a non-resident defendant insists upon a right of removal on the ground that a resident defendant has been joined for the fraudulent purpose of preventing removal of the cause to a Federal court, the allegations in the petition for removal, taken in connection with the record as it then exists, must clearly disclose sufficient *facts* to enable the Federal court, on demurrer, to conclude as a matter of law that there has been such joinder for such fraudulent purposes.

In *Gold Washing Company v. Keys*, 96 U. S., it is said (p. 202):

"For the purpose of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading. Upon its statements, in connection with the other parts of the record, the courts must act in declaring the law upon the question it presents. It should, therefore, set forth the essential facts, not otherwise appearing in the case, which the law has made conditions precedent to the change of jurisdiction. If it fails in this, it is defective in substance, and must be treated accordingly."

The rule with reference to the particularity necessary in pleading fraud may be stated thus: Whether the fraud be alleged in the declaration, complaint, or bill, or set up by way of defense in the plea, answer or replication, it is essential that the facts and circumstances which constitute it should be set out clearly, concisely, and with sufficient particularity to apprise the opposed party of what he is called upon to answer.

The reason of this rule is that fraud is a conclusion of law from facts stated, and it is a well-settled rule of pleading that facts, and not legal conclusions, are to be applied. Mere general assertions of fraud or the fraudulent conduct of a party, without the facts, do not constitute statements upon which the court can pronounce judgment. (Enc. P. & P. 687, 688.)

As said by Mr. Justice HARLAN, speaking for this

court in *Fogg v. Blair*, 139 U. S. 118–127, with reference to what was admitted by a demurrer to a bill:

"As he impugned the good faith of the transaction between the company and the contractors, it was incumbent upon him to state the essential, ultimate facts upon which his cause of action rested, and not content himself with charging, generally, that what was done was 'colorable,' a 'fraud,' 'a breach of trust,' and a 'scheme' by which Blair and Taylor were to get the stock without paying for it. These are allegations of legal conclusions merely, which a demurrer does not admit."

In *Van Weel v. Winston*, 115 U. S. 228, Mr. Justice MILLER, speaking for the court, said (p. 237):

"The bill is a long one, the allegations are not classified, nor the true foundations of relief very clearly stated. It is full of the words fraudulent and corrupt, and general charges of conspiracy and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief."

In *Ambler v. Choteau*, 107 U. S., 586–591, this court, speaking through Mr. Chief Justice WAITE, said:

"The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another, they have no more

effect than other words of unpleasant signification. While in this case the offensive words are used often enough, the facts to which they are applied are not such as to make the defendants answerable to the complainant for the . . . relief he asks."

Applying these rules to the second petition for removal, nothing appears from which this court can possibly conclude that Fritzlen was fraudulently made a defendant. For the very essence of fraudulent joinder to defeat removal is, that against the resident defendant the resident plaintiff is attempting to assert a cause of action which in reality does not exist. It is a contradiction of terms to assert that a defendant whom a plaintiff has a legal right to sue is a sham or fraudulent party. It is equally bad logic to attempt to arraign a debtor whose valid obligations are held by his creditor, on the same side of a case with his creditor in an action by the creditor to enforce his legal right of action, and recover a lawful judgment.

Without an exception the decisions which hold that a resident defendant has been joined with a non-resident defendant to defeat the right of removal are bottomed on the fact, either proved or admitted, that the plaintiff has no valid cause of action against the resident defendant. Not a single decision can be found where the court has sustained the right of removal in which it has not been alleged and proved (or admitted) that no cause of action really existed against the resident de-

fendant. And from the nature of the case, no court will ever hold that a petition for removal on the ground of a fraudulent joinder of a resident defendant can be sustained in the absence of unmistakably clear allegation and proof that the resident defendant is a sham party against whom the plaintiff has, in fact, no cause of action whatever.

In the case at bar the petition for removal nowhere alleges that Weldon's note and mortgage are fictitious. There is not a single word in this petition from which such a state of facts can be even inferred. Indeed, the non-resident bank, under the Kansas rule of pleading, admits the validity and amount of Weldon's debt and liens. We therefore must deal with a situation where a non-resident charges fraudulent joinder in his petition for removal, but admits that the plaintiff has a good cause of action against the resident defendant.

This precise question was considered by Judge SHIRAS in *Deere v. Chicago Railway Company*, 85 Fed. 876, where the petition for removal alleged:

"That the plaintiff has improperly and fraudulently joined said Slack Peterson as a party defendant with your petitioner in this case for the sole and express purpose of defeating the jurisdiction of the United States court, . . . and with the sole, improper, and fraudulent purpose and intent of preventing this defendant from removing this case to said United States Circuit Court. . . . "

Considering this allegation, Judge SHIRAS said:

"With regard to the first ground, it is sufficient to say that the motive actuating the plaintiff in bringing the suit against both defendants cannot be relied on as a ground for removing the case into this court. The railway company, by filing the petition for removal, has declared its preference to be in favor of trying the case in the Federal court; and the plaintiff, by bringing the suit in the State court, has declared its preference to be in favor of the State court. The motive of the railway company in seeking a removal is to avoid a trial in the State court, and the motive of the plaintiff in joining the defendants is to avoid a trial in the Federal court. These motives cannot be availed of to defeat the right of removal, if it legally exists, nor to defeat the right to remain in the State court, if the statute does not authorize a removal."

But the Kansas Supreme Court say also that the petition for removal discloses that Weldon and Fritzlen fraudulently conspired together to bring this action in the manner and form in which it was brought, for the purpose of preventing its removal to the Federal court. But this court has decisively settled that Federal jurisdiction cannot be affected by the *motive* of a party who brings a suit in a United States court. The cases in which this rule is laid down are collected by Mr. Justice HARLAN in *Lehigh Mining Company v. Kelly*, 160 U. S. 327. Among the cases cited is that of *McDonald v. Smalley*, 1 Peters, 620-624, in which Chief Justice MARSHALL considered the following state of facts:

"The transaction as laid before the court, appears to

be this: McArthur was apprehensive that his title could not be sustained in the courts of the State, in which alone he could sue; and being indebted to McDonald in the sum of $1100, offered to sell and convey to him the land in controversy, in payment of this debt. The letter in which the offer was made expresses the opinion that his title is good, and would most probably be established in the courts of the United States, but would fail in the courts of the State. He suggests that if McDonald should be disinclined to engage in the controversy himself, he might make an advantageous sale to some of his neighbors, who might be disposed to emigrate to Ohio; and offers to render any service in his power to the proprietor of the land, in the prosecution of the claim in the courts of the United States."

The learned Chief Justice stated the conclusion of this court as follows:

"The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity.

"They were such as had sufficient influence with himself, and he had a right to act on them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different States. . . . The case depends, we think, on the question whether the transaction between McArthur and McDonald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as a mortgage."

In *Smith v. Kernochan*, 7 How. 216, this court was called upon to determine whether the fact that a plaintiff had acquired a mortgage for the express purpose of

conferring jurisdiction upon the Federal court constituted any bar to maintaining his action in that court. It answered the question as follows:

"The most that can be claimed is that the company intended a fraud upon the eleventh section of the judiciary act, in seeking to obtain a decision of the Federal courts upon the validity of the mortgage between themselves and the defendant, both parties residents and citizens of the same State, using the name of the plaintiff as a cover for that purpose. . . . Assuming that both parties concurred in the motive alleged, the assignment of the mortgage having been properly executed and founded upon a valuable consideration, passed the title and interest of the company to the plaintiff. The motive imputed cannot affect the validity of the conveyance. The suit would be free from objection in the State courts, and the only ground upon which it can be made effectual here is, that the transaction between the company and the plaintiff was fictitious and not real; and the suit still, in contemplation of law, between the original parties to the mortgage. The question is, therefore, one of proper parties to give jurisdiction to a Federal court; not of title in the plaintiff. That would be a question on the merits, to decide which the jurisdiction must first be admitted.

"The true and only ground of objection in all these cases is, that the assignor, or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then in fact a controversy between the former and the defendants, notwithstanding the conveyance; and if both parties are citizens of the same State, jurisdiction of course cannot be upheld."

It would be a singular perversion of all rules of consistency to hold that a debtor may make a valid mortgage of his property to a non-resident creditor for the *avowed, express purpose of defeating* the jurisdiction of the courts of his State, but cannot make a valid mortgage to a resident creditor for the purpose of preventing a removal *from* the courts of his State. In *McDonald v. Smalley, supra,* the case laid before this court and decided by Chief Justice MARSHALL, was one in which a resident debtor *was apprehensive that the courts of his State would decide that his title to his property was invalid,* and for the *avowed purpose* of preventing the adverse claimant from getting the benefit of the State court's rule of decision, mortgaged his property to a non-resident *with the intent and design* of putting the non-resident creditor in a position to defeat the State court's jurisdiction. But the *debt* was real, not fictitious, the *mortgage was a valid conveyance,* and by the transaction the non-resident's right of action against his debtor mortgagor was unassailable; and, *therefore,* this court held that "A court cannot enter into the motives which "induced him to make the contract, whether justifiable "or censurable. . . . The case depends on the "question whether the transaction was real or fictitious; "and we perceive no reason to doubt its reality, whether "the deed be considered as absolute or as a mortgage." In *Smith v. Kernochan, supra,* equally clear reasoning

is shown. There it was charged, in terms, that the plaintiff acquired his mortgage for the express purpose, collusively agreed to by his mortgagor, of perpetrating a fraud on the judiciary act by seeking to obtain a decision of a Federal court upon the validity of a mortgage where both mortgagee and mortgagor were citizens of the same State. Was this admitted fact permitted to confer jurisdiction on a State court and oust the jurisdiction of the Federal court? Not at all. Mr. Justice NELSON well said:

"The true and only ground of objection in all these cases, is that the assignor or grantor, as the case may be, is the real party to the suit, and the plaintiff on the record merely nominal or colorable, his name being used merely for the purpose of jurisdiction."

Is it a fraud for a debtor to give his creditor a *bona fide* note and mortgage when the effect *and purpose* of the transaction is to prevent a removal of the contemplated suit from the State to a Federal court, and the same transaction unobjectionable when its effect and purpose is to prevent a trial in a State court? Is it a fraud to give a *bona fide* resident creditor security for his debt and arrange with him to enforce the security in a State court, and not a fraud to do the same thing with a non-resident creditor and arrange with him to enforce the security in a Federal court? The decisions we have cited and quoted answer these questions better than any words we can find. The plain meaning of these

decisions is, that the *motives* of the debtor and creditor in entering into a *valid* contract, evidenced by a note and mortgage, is not justiciable. "A court cannot enter into them when deciding its jurisdiction."

We repeat, that in the Bank's petition for removal there is no allegation from which this court can find that Fritzlen was not justly indebted to Weldon, or that Weldon's note and mortgages were not valid contracts supported by a valid and valuable consideration passing from Weldon to Fritzlen; and, therefore, it inevitably follows, that this petition for removal does not state facts sufficient to justify the court in finding a fraudulent joinder of a sham defendant for the purpose of defeating the jurisdiction of the Circuit Court of the United States on removal.

CONSIDERED AS AN ATTACK UPON THE FINAL ORDER OF THE CIRCUIT COURT REMANDING THE CASE TO THE STATE COURT, THE SECOND PETITION FOR REMOVAL IS WHOLLY INSUFFICIENT.

The foregoing cases establish that a petition for removal should be considered and interpreted as any other pleading, and, in connection with the record as it then exists, must affirmatively allege sufficient facts to deprive the State court of jurisdiction.

In this case the petition for removal upon which the non-resident defendant must rely, was required to do more than state facts sufficient to oust the original

jurisdiction of the State court, because that jurisdiction had re-attached under the final order of April 2, 1904, and it became necessary for the petitioner not only to show that sufficient grounds for removal existed, but that such grounds either did not exist at the time the case was remanded, or that the petitioner had, without fault on its part, failed to discover them in time to set them out in the first petition. The second petition for removal fails to meet these obvious requirements. Weldon's original petition was not amended, and his reply set up neither a new nor an amended statement of facts. It still disclosed the very same grounds upon which the Circuit Court had determined there was no case cognizable in the Federal courts. The only attempt made by the petitioner for removal to meet this situation is found in the statement that Fritzlen had not answered until after the cause had been remanded, and that this delay was due to an agreement between Fritzlen and Weldon having for its object the deprivation of the Bank's right of removal; and that until Fritzlen filed his answer and Weldon filed his reply, the Bank could not know that these parties were in such a conspiracy. These allegations plainly show that the Bank depends upon the allegations in Fritzlen's answer and Weldon's reply to show that such a change in the case had been brought about as to entitle it to a removal, notwithstanding the final order of April 2,

1904, remanding the case. This argument again ignores the cross-demand set out against both Weldonand Fritzlen in the Bank's answer, and again treats Fritzlen's answer as a voluntary attack upon the Bank's mortgages and note, instead of defensive matter set up responsive to the assertion of the Bank's liens. But even if Fritzlen's answer be considered as a cross-bill, still it could not have the effect of changing the case made by Weldon's original petition. "A cross-bill is a mere auxiliary suit and a dependency of the original." (*Cross v. DeValle*, 1 Wall. 5.) See also *Ex Parte Railroad Co.*, 95 U. S. 221–225.

In *Maish v. Bird et al.*, 48 Fed. 607, Circuit Judge McCRARY had such a contention before him. In an action in a State court brought by a resident of Iowa to foreclose a mortgage against a citizen of the same State, a non-resident creditor was made a party on the ground that he had some interest in the property. The non-resident set up by way of cross-bil that the mortgage alleged in the plaintiff's petition was fraudulent and void, and thereupon filed a petition for the removal of the cause, on the ground of a separable controversy. To this the court, on motion to remand, said:

"I am of the opinion that the non-residentdefendant could not, by filing a cross-bill of this character, so change the nature of the suit as to make it removable and thus compel Maish and Bird to bring their contro-

versy here. If this is within the power of any non-resident who happens to be made a defendant in a foreclosure suit in the State courts, the consequences must be very serious. A cross-bill is a defense. It cannot be employed for the purpose of introducing into the suit any distinct matter. It is only auxiliary to the original suit, and a graft and dependency on it. The original and cross-bill together constitute but one suit. We cannot look alone to the cross-bill to determine whether the suit is removable." (3 Daniels Ch. Pr. 1851; *Ayers v. Chicago*, 101 U. S. 184; *Donahue v. Mariposa Co.*, 5 Sawy. 163.)

If, in the case at bar, we look to the original bill (Weldon's petition) for the purpose of determining the nature of the suit, we find that the final order of the Circuit Court remanding the cause declares that such petition does not disclose a controversy cognizable in the Federal courts, because an indispensable party defendant to such suit is a citizen of the same State as the plaintiff. Unless, therefore, a cross-bill can so change the nature of the suit made by an original bill as to inject a new and independent suit, the original judgment remanding the case must control. On the other hand, if the cross-bill does inject into the original suit something which is not auxiliary to and a graft upon the original suit, then such cross-bill would have to be dismissed under the chancery practice in the Federal courts, and could not for that reason form a ground of removal. If Fritzlen's answer be considered as setting up a counter-claim, then it could not survive a removal

of the cause to the Federal court. In *Brande v. Gilchrist*, 18 Fed. 465, it appears that a defendant set up a counter-claim, and thereupon the complainant removed the case, setting out that a separable controversy was presented by the counter-claim. To this the court said:

"It is to be borne in mind that this is a suit in equity, and must therefore, in this court be governed by the rules of equity practice. The counter-claim, it is true, is a form of pleading which, even in such a suit as this, is recognized as proper in the State court practice. But here it can have no recognition as a counter-claim. No such form of pleading is permissible in this court in a suit in chancery. The controversy raised by the counter-claim, if insisted on here, must be presented by cross-bill. This being so, the controversy arising upon the counter-claim, and to which it is said the complainant and the defendant Gilchrist alone are necessary parties, did not, in its original form, survive the removal of this cause to this court. This must be so, if this court cannot recognize the counter-claim as a valid form of pleading and adjudicate the rights of the parties under it. It is said, however, that the defendant Gilchrist has the right to file a cross-bill and thus litigate the controversy presented by the counter-claim. *Non constat* that he will do so or wishes to do so."

This last case presents in a very strong light the want of logic in the non-resident defendant Bank's argument. It must be admitted that no case can be removed to the Federal courts which could not have been originally brought there, yet it seems to be contended, that by setting up a counter-claim a defendant can confer

jurisdiction on a Federal court of a case of which it is denied original jurisdiction. If this cause had been removed, what possible form could the pleadings have taken to affirmatively show jurisdiction? We submit that it is and always has been a legal impossibility to so recast the pleadings in this case as to make it one of which the Circuit Court of the United States could take cognizance. It is true Fritzlen might have brought his action for damages against the Bank for causing the death of his live-stock, but by no possible construction of the Federal statutes could Weldon have foreclosed his mortgages and had a determination of the amount, nature and validity of liens on the mortgaged property in a Federal court, for the all-sufficient reason that his mortgagor, in possession of the mortgaged property, is and has always been a citizen of the plaintiff's State.

The statement that the filing of Fritzlen's answer was delayed so as to conceal from the Federal court the conspiracy to defeat its jurisdiction, seems to us absurd, when the filing of that pleading could not have conferred jurisdiction upon the Circuit Court. This contention becomes more unreasonable when it is remembered that the non-resident defendant was in default of an answer to Weldon's petition from September 4, 1903, to May 14, 1904, and that Fritzlen answered the Bank's pleading twelve days after it was filed. It might as well be

claimed that the Bank kept back the assertion of its note and mortgages until after the cause was remanded for the purpose of concealing from the Circuit Court that it intended in the State court to ask for a judgment fixing the amount, nature and validity of a debt claimed to be owing by Fritzlen and fastening upon his property liens amounting to over $30,000.

But it is claimed by the Bank and stated in the opinion of the Kansas Supreme Court, that until the filing of Fritzlen's answer and Weldon's reply the non-resident defendant could not have made out its case of fraudulent joinder to prevent removal, and that these pleadings first uncovered the fraud and collusion. The answer to this is, that nothing in either Fritzlen's answer nor Weldon's reply have the slightest tendency to show that Weldon was not proceeding in the usual and ordinary way, in a court of undoubted jurisdiction, to foreclose his liens and collect an admittedly valid debt due him from Fritzlen. That this cannot show fraudulent collusion to defeat the right of removal, is demonstrated by the fact that Weldon could not have proceeded in the Federal court if he had desired to do so. And surely if Weldon could not have begun his suit in the Federal court, Fritzlen could not have entered into a fraudulent conspiracy to defeat a right of removal which never existed. Moreover, Fritzlen's answer could not confer jurisdiction of the Federal court

over Weldon's cause of action. If Fritzlen and Weldon had entered into a collusive agreement to confer jurisdiction on the Federal court, it would have been utterly futile, since the case was not cognizable in such court, whatever the parties might do. We confess that we have never been able to understand the theory which admits the existence of a cause of action of a citizen of Kansas against another citizen of Kansas to recover a debt and foreclose liens on Kansas property, and, at the same time, insists that a Federal court could obtain jurisdiction of such a suit by charges of fraudulent joinder of the mortgagor.

This court in *Fitzgerald v. Missouri Pacific Railroad Co.*, 160 U. S. 556, had occasion to consider the effect of a final order of a Circuit Court remanding a case to a State court from which it had been removed. It appears that a non-resident defendant removed the case, and the first hearing on the motions to remand resulted in their being overruled. Afterwards, upon reconsideration, the motions to remand were sustained and the cause tried in the State court. The removing defendant then attempted to secure a review by the court of the order remanding the cause. After quoting the provisions of section 6 of the Act of March 3, 1887, the court spoke with approval of the following language of Mr. Justice BRADLEY, in *In re Pennsylvania Company*, 137 U. S. 451–454:

"In terms, it only abolishes appeals and writs of

error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the State court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal courts. The abrogation of the writ of error and appeal would have little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process."

In view of this settled rule of the conclusive character of final orders remanding causes, it seems to us little short of incredible, that the order of the Circuit Court of April 2, 1904, should have been disregarded by the Supreme Court of Kansas on the allegations of the second petition for removal, when the patent fact appeared of record that Weldon, the original plaintiff, whose original petition characterized the case and which was the foundation upon which rested the order of remand, had done absolutely nothing to forfeit or impair the rights acquired by the judgment of the Circuit Court

that the case made by his petition was not removable. It is true the Kansas Supreme Court announces that under the allegations of the second petition for removal Weldon had been eliminated from the case, but we cannot bring ourselves to believe that this was intended as anything but by way of argument. We cannot believe that a plaintiff seeking to recover an admitted debt and foreclose valid mortgages securing it can be "eliminated" from his own suit by a charge in a petition for removal that his debtor admitted the debt and the liens securing it. This court has again and again held that the nature of the case is never to be determined from the defense or want of defense made by the resident defendant. Yet, according to the theory of our adversaries, as soon as Fritzlen admitted Weldon's cause of action, that ended Weldon's case and Fritzlen ceased to be a necessary party to the suit. We cannot agree to this. Carried to its logical conclusion, if a plaintiff sets up in his petition declarations of the defendant admitting the debt and mortgages sued on, then a non-resident defendant may utterly ignore the presence of the defendant mortgagor in possession, and successfully contend that the "controversy" is cognizable in the Federal courts, because no dispute exists between the resident mortgagor in possession and the foreclosing plaintiff. But the Bank itself admits, by its answer filed before Fritzlen's answer was filed, that

Weldon's note and mortgages are valid and constitute enforcible liens against Fritzlen's property. Why, therefore, should Fritzlen's admission of the same fact be permitted to destroy the force and effect of a final judgment upon which Weldon had a right to rely? Is it any reason to deprive a litigant of the benefit of a final judgment that a certain court has jurisdiction of a case, that parties whom he has made defendants in his action while admitting his cause of action enter into controversies between themselves? If this is the only effect of a judgment remanding a cause, then it is no longer the rule that separate defenses do not make separable controversies, and defendants may change the whole nature and character of a plaintiff's case whenever they desire to do so by merely injecting into the case separate defenses by way of counter-claim or otherwise. We do not think this is the law. It is our understanding that a party to a judgment cannot be deprived of the benefits of that judgment by something done or omitted by another, and that it affords no justification for ignoring a final order remanding a cause to a State court, that after such remand has been carried into execution parties defendant set up matters of defense and counter-claim connected with the subject of the action so as to have a final determination of all matters of controversy growing out of their relative rights and obligations in respect of the subject-matter

of the suit. We submit that Weldon's motive in bringing his action against Fritzlen in the only court on the face of the earth where such action was cognizable, is not material; and that if the note and mortgages on which his action is founded had been given, *for a valid and valuable consideration, for the express purpose of preventing the Boatmen's Bank from removing the cause,* none the less Weldon would still have the legal right to enforce his cause of action against Fritzlen in the State court. And that until it is made to appear, by allegations of facts from which the court may properly so conclude, that Weldon's note and mortgages are utterly fictitious, it is wholly illegal to deprive him of the benefit of a judgment remanding the cause to the State court; and that a petition for removal which fails to meet these requirements is bad on its face, and any judgment which holds it is sufficient to destroy or impair the effect of such final judgment remanding the cause, denies to a judgment of a Federal court the full faith and credit to which under the laws of the United States it is justly entitled.

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OCTOBER, 1908.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1908.

D. G. FRITZLEN, EDNA P. FRITZLEN AND W. H. WELDON, *Plaintiffs in Error,*

vs.

BOATMENS BANK, *Defendant in Error.*

No. 99.

Error to the Supreme Court of the State of Kansas.

Statement, Points and Authorities, Brief and Argument of Defendant in Error.

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STATEMENT.

This suit comes to this Court by writ of error brought by plaintiffs in error. (pp. 103-104, Rec.) It was brought in the District Court of Clark County, Kansas, and went from that Court to the Supreme Court of Kansas, from which it comes to this Court. It is a suit in equity, and was brought by plaintiff in error, W. H. Weldon, suing as plaintiff, against plaintiffs in error, D.

G. Fritzlen and Edna P. Fritzlen, and defendant in error, Boatmens Bank, as defendants.

There are two questions in the case for decision by this Court. One question is, whether said suit was removable by the Boatmens Bank from said District Court of Clark County, Kansas, to the Circuit Court of the United States for the Kansas District in which said Clark County is situated, as involving controversies between citizens of different states. And, second, whether the Supreme Court of Kansas, having sustained the removal on the part of the Boatsmens Bank, its decision is now reviewable by this Court.

The Boatmens Bank, the defendant in error herein, was and is a corporation created by the laws of the State of Missouri and doing business as a bank at St. Louis, Mo. All the plaintiffs in error, Fritzlen, Fritzlen and Weldon were and are citizens and residents of Clark County, Kansas.

There are three controversies in the case. One involves the validity of a chattel mortgage and a real estate mortgage given by the Fritzlens to the Bank as security for an indebtedness of $32,920.15, which Fritzlen owed the Bank. (p. 35, Rec.) Respecting this controversy, the bank affirms the validity of those two mortgages, while all the plaintiffs in error join in claiming that said mortgages are invalid.

The second controversy in the case arises out of a claim or common law cause of action maintained by plaintiff in error, D. G. Fritzlen, in his answer or cross-petition, as it is called, against the bank for a breach of contract between said D. G. Fritzlen and the bank, which claim was made for the sum of $20,000. Plaintiff in error, W. H. Weldon, is not in anywise interested in that cause of action for damages.

The third controversy in the case arises out of a common law claim for $25,000 damages maintained in his

answer or cross-petition by plaintiff in error, D. G. Fritzlen against the bank, for the alleged trover and conversion of the cattle covered by said chattel mortgage held by the bank.

It is thus seen that the first controversy in the case is between all of the plaintiffs in error on the one hand, and the bank on the other, and that as respects the second and third controversies, they are between the plaintiff in error Fritzlen on the one hand and the bank on the other.

Plaintiff in error, D. G. Fritzlen, during all the times mentioned in the record in this cause was and still is the owner of a large cattle ranch consisting of about 5,000 acres of land, in said Clark County, Kansas. On that ranch Fritzlen had about 1500 head of cattle and a large number of horses and other animals and personal property. As such owner of said ranch and live stock thereon, Fritzlen carried on an extensive business in the purchase and sale of cattle. In the carrying on of that business he became largely indebted. On March 31, 1899, he owed the Elmore & Cooper Live Stock Commission Company $42,083.59. (pp. 69-70, Rec.) Said commission company was a company doing business at the Kansas City Stock Yards, in the purchase and sale as such commission company, of cattle and live stock. Said indebtedness from Fritzlen to that commission company was for loans which the commission company had made to him prior to that time, and that indebtedness was secured by chattel mortgages executed by Fritzlen to it covering the cattle and live stock on his ranch.

On said March 31, 1899, the defendant in error, Boatmens Bank, in the regular course of business, purchased said notes and chattel mortgage from said commission company. After the purchase of said notes and mortgage by the bank, Fritzlen made certain payments thereon, and on November 30, 1901 there was still due

the bank thereon from Fritzlen, after giving Fritzlen credit for such payments, a balance of about $19,000. (pp. 70-71, Rec.) On said November 30, 1901, Fritzlen, in addition to said $19,000, owed the further sum of about $6,000 on a real estate mortgage which he had given on his said ranch. (pp. 70-71, Rec.) In this way the mortgage indebtedness of Fritzlen amounted to about $25,000, then past due. He also owed certain sums by way of floating indebtedness and for taxes and other items, and on said November 30, 1901, it was arranged between Fritzlen and the bank, that the bank should loan Fritzlen the requisite amount to take up said items of indebtedness of $6,000 secured by his real estate mortgage and chattel mortgage indebtedness of $19,000; that all said indebtedness should be extended and that the bank should loan Fritzlen an additional sum to enable him to pay his taxes and outstanding general indebtedness, and also to enable him to purchase some calves. Accordingly, the entire indebtedness was merged into one loan and was renewed and extended by said note of $32,920.15 (p. 35, Rec.), which Fritzlen gave the bank, on November 30, 1901, through its agent, John H. Pinnell, payable for said sum of $32,920.15 eleven months after the date of said note, November 30, 1901. This note, as already stated, was made payable to the order of John H. Pinnell, who was the bank's agent, and immediately endorsed and transferred by Pinnell to the bank and has ever since been held by the bank.

The bank paid off the $6,000 real estate mortgage of Fritzlen, surrendered the Elmore & Cooper Commission Company note of $19,000.00 to Fritzlen, and paid Fritzlen in cash the difference between those two amounts and the note for $32,920.15. To secure to the bank the payment of said note given by Fritzlen for $32,920.15 Fritzlen gave a chattel mortgage on all the live stock on his ranch, consisting of 1,461 head of cattle and 171 head

of horses and certain mules and other personal property. (pp. 36 to 39, Rec.) At the same time, to further secure the payment of said note for $32,920.15, Fritzlen and wife executed and delivered their real estate mortgage on said ranch. (pp. 39 to 42, Rec.) This chattel mortgage, as we have seen, covered the same cattle, horses, live stock and other property on the ranch which had been covered by the Elmore & Cooper Commision Company chattel mortgage purchased by the bank, and the real estate mortgage given as additional security to the bank to secure its note of $32,920.15, covered the same real property that had been covered by the $6,000 real estate mortgage so taken up by the bank. These chattel and real estate mortgages thus taken by the bank were not renewed by Fritzlen on the maturity of said $32,920.15 note on October 30, 1902, when that note became due.

The only payment on this indebtedness made by Fritzlen to the bank in 1902, was $5,281.50. (pp. 35-72, Rec.) So that, computing interest on the note from its date, as stipulated therein, there was still due the bank on January 1, 1903, a balance of over $30,000 due on the note.

During 1903, the bank furnished to Fritzlen money for the purchase of feed for his cattle and live stock. (pp. 74-77, Rec.) In February, 1903, the bank furnished $792 to Fritzlen for oil cake for the cattle. On March 10, 1903, the bank furnished him $647.50 to purchase oil cake for said cattle, and on March 28th the bank furnished $388.50 to Fritzlen to purchase oil cake for said cattle. (p. 74, Rec.)

In February, 1903, there came to the district of the country in which said ranch is situated, an unprecedented snow storm, in consequenee of which Fritzlen lost over 500 head of cattle by death. And one of the controversies in this case arose by the claim of Fritzlen against

the bank that the bank should make good to Fritzlen his loss of said cattle from said storm, amounting to $20,000. (pp. 50-51, Rec.)

The contention of the bank was and ever has been in this case, that it was not liable to Fritzlen for that loss, on two grounds; First, that the requests by Fritzlen on the bank for money to buy feed, or for feed, had been complied with on the part of the bank, by the purchase and shipment of feed in each instance by the bank to Fritzlen.

It was claimed by Fritzlen that the shipment of oil cake, February 6, 1903, amounting to $792 (p. 74, Rec.), did not reach Fritzlen until after the snow storm and that the death of the cattle was due to the failure of the bank to get the oil cake out in time to save the cattle from the storm.

The bank, however, contended and proved that some time prior to the storm, which took place in the latter part of February, 1903, the oil cake was purchased by the bank and put on board the cars and shipped to Fritzlen, and that the bill of lading in Fritzlen's name was mailed to and received by him three or four weeks prior to the storm. The oil cake was on the way three or four weeks, and was detained for some reason by the railway carrier; and the bank has always contended that it discharged its duty to Fritzlen when it purchased for him and put on the cars the oil cake for his cattle and sent to him the bills of lading therefor, which he held for two or three weeks before the coming of the storm and that the carrier after shipment held the feed at his risk and as his property. The bank has also contended that the loss of the cattle was due to the unprecedented storm considered as an act of God and considered as the immediate and proximate cause of the loss of the cattle, and that the loss of the cattle would have occurred even if the feed delayed by the carrier had arrived before the storm.

It cannot and will not be contended in this case that this controversy, when it arose in March, 1903, between Fritzlen on the one hand and the bank on the other hand, as to the loss of said cattle, was not a controversy between citizens of different states. This controversy between Fritzlen and the bank which thus arose in February and March, 1903, continued until July 2, 1903, and ever since. On said last day Fritzlen was indebted to plaintiff in error Weldon in the sum of $3,750, and on that day Fritzlen and wife executed and delivered to Weldon their note for said sum of $3,750, dated July 2, 1903, and payable ten days after date. (p. 14, Rec.) This note was based on a security debt which Fritzlen had owed and on which Weldon was liable as his security and which Weldon had paid.

There never has been any controversy between Weldon and Fritzlen as to this indebtedness, either at the time of giving said note by Fritzlen and Weldon therefor, or prior thereto or since. At the time of the giving of said note on July 2, 1903, by Fritzlen to Weldon, Fritzlen and wife gave Weldon a chattel mortgage on the same cattle, horses and other personal property on which the bank held its said past due chattel mortgage, and said Fritzlen and wife also gave to Weldon a real estate mortgage covering the same land on which the bank held its said past due real estate mortgage. (pp.11-12, Rec.) Those mortgages were given by Fritzlen and wife to Weldon to secure said note, payable ten days after date, and, as we have seen, that $3,700 note from Fritzlen to Weldon and the two mortgages to Weldon were given about five months after the loss of cattle which Fritzlen had tried to shoulder on the bank.

In this situation this suit was brought by Weldon against the Fritzlens in which the bank was made a party on July 23, 1903. (pp. 11-15, Rec.) The giving of the note and mortgages to Weldon, and the bringing by him

of this suit, all occurred within the space of twenty-one days. The petition of Weldon made the bank a party and charged that the mortgages held by the bank were void. (p. 13, Rec.) The petition concluded with a prayer that Weldon be deemed the holder of a prior and first lien on said personal and real property. (p. 13, Rec.) And Weldon further prayed in the prayer of his petition that the pretended lien and interest of the bank be declared to be illegal and void. (p. 14, Rec.) The bank was notified of the suit by publication. (pp. 14 to 17, Rec.)

On July 30, 1903, Weldon obtained from the Probate Judge of said Clark County, Kansas, a restraining order until the hearing and determination of his (Weldon's) application for a temporary injunction before the District Judge of said Clark County, Kansas, restraining the Fritzlens and the bank from disposing of the personal property mentioned in Weldon's petition. (p. 25, Rec.)

On August 13,1903, and within due time, the bank appeared and filed a demurrer to Weldon's petition and at the same time filed its (the bank's) petition and bond for the removal of this cause to the United States Circuit Court for the District of Kansas sitting in the Second Division thereof, in which division said Clark County was and is situated. (pp. 26 to 30, Rec.) As the United States Circuit Court for the District of Kansas, in said Second Division thereof, convened on the Second Monday of September, 1903, which was prior to the next term of the District Court of Clark County, Kansas, the bank obtained a transcript of the record in this case up to that time, including a copy of its removal petition and bond and filed the same in said United Stattes Circuit Court at Wichita. And on September 14, 1903, on which day said United States Circuit Court convened for that term, Weldon and the Fritzlens appeared in said United States Circuit Court and filed motions to remand this

cause back to the Clark County District Court. These motions to remand were heard and overruled by the court. (pp. 30-31, Rec.) The order overruling said motions to remand and holding that said removal by the bank was rightly taken, was made on said September 14, 1903. (p. 31, Rec.) As a part of said order by the court, it was ordered that said Weldon be given thirty days within which to replead and recast his pleadings in this cause. This order was obtained because Weldon's petition was framed under the Kansas code and not with any reference to the chancery practice obtaining in such cases in the federal courts. (p. 31, Rec.)

At the time of the hearing of said motions to remand, which were thus filed by Weldon and the Fritzlens, there was presented and filed in said cause, in addition to the bank's petition for removal, which had been filed in the state court, an original petition in said United States Circuit Court for the removal of said case for local prejudice, but this petition was not considered. (p.31, Rec.)

At the same time, of and following the overruling of said motions to remand, the said restraining order granted by the Probate Court was taken up and considered, and the bank's motion to dissolve the same was sustained and the application for a temporary injunction was denied by said United States Circuit Court. (p. 31, Rec.)

At the same time, in August, 1903, that the bank filed its petition and bond for the removal of this case, it also commenced an original action in said Circuit Court of the United States for the District of Kansas, Second Division, against the plaintiffs in error, Fritzlen, Fritzlen and Weldon, as defendants, to foreclose the lien of its said real estate mortgage. (p. 42, Rec.)

Thus it is seen that by virtue of said foreclosure action of said real estate mortgage and the removal of

this case, so adjudged by said United States Circuit Court on September 14, 1903, to have been lawfully and properly taken, said United States Circuit Court became invested with jurisdiction over said foreclosure suit and over this case.

In this situation, in the next month of October, 1903, the bank, in order to avoid the expense of a long drawn out receiver case, brought an action of replevin against said plaintiffs in error as defendants therein, in said United States Circuit Court for the District of Kansas, Second Division, and having given a proper replevin bond to the defendants, obtained possession of all the cattle, horses and other personal property on the Fritzlen ranch covered by the bank's chatted mortgage, and thereupon, in October and November, 1903, the bank sold said cattle and other personal property, realizing therefrom about $18,000 on its mortgage indebtedness. (pp. 42-43-44-71-72-73, Rec.) Thus all the litigation consisting of all three suits were pending in the Federal Circuit Court in October, November and December, 1903.

The motions to remand, which were heard and overruled, as already stated, on September 14, 1903, were heard and decided by Judge Lochren of Minnesota, who held the September Term, 1903, of the United States Circuit Court for the District of Kansas, Second Division, at Wichita, Kansas. However, after the bringing of the replevin suit in October and the sale of the cattle, it so happened that the Honorable John C. Pollock became Judge of the District Court for the District of Kansas, and in March, 1904, and at the March Term, 1904, of said United States Circuit Court at Wichita Judge Polock allowed the Fritzlens and Weldon to refile their motions to remand, and on April 2, 1904, notwithstanding the previous decisions at the September Term, 1903, of Judge Lochren, Judge Pollock ruled the other way and sustained the same motions to remand which Judge Lochren had

overruled. (p. 33, Rec.) Judge Pollock delivered a written opinion, which is reported.

Weldon v. *Fritzlen*, 128 Fed. Rep., 608.

Following the order of remand in this cause thus made, defendants Fritzlens and Weldon filed their motion in said replevin action to dismiss the same for want of jurisdiction. This motion was sustained by the same learned Judge who remanded the cause by an order of date April 25, 1904. (pp. 43-44, Rec.)

The grounds upon which the motion to dismiss the replevin action was based and upon which the order of dismissal was made, were that this action had never been in the United States Circuit Court and had still remained in the state court, notwithstanding the above order of Judge Lochren of September 14, 1903, and that there was a conflict of jurisdiction presented between this action considered as still pending in the Clark County District Court and the replevin action thus brought by the bank in the United States Circuit Court.

This judgment of dismissal in the replevin action was brought before the United States Circuit Court of Appeals of the 8th Circuit by a writ of error, and that replevin action having been heard in the Circuit Court of Appeals, that court reversed the judgment of dismissal and remanded the case back to the United States Circuit Court. The question before the Circuit Court of Appeals on that writ of error was whether the removal petition and bond of the bank filed in this case in August, 1903, and the order of Judge Lochren of September 14, 1903, had the effect to invest the Circuit Court of the United States with jurisdiction over this case, or whether, notwithstanding the petition and bond for removal and the order of Judge Lochren, this case was still in the District Court of Clark County, Kansas. While the order of remand made in 1904 was unappealable, the

Circuit Court of Appeals was called upon to decide the effect of the removal petition and bond and the order of Judge Lochren, both made in 1903 and prior to the replevin suit, and that Court held that the removal was properly taken and that Judge Lochren had jurisdiction to dissolve the restraining order and to refuse a temporary injunction, and that there was no conflict of jurisdiction between the replevin action and this suit, both pending in the said United States Court in October, November and December, 1903. The opinion of the Circuit Court of Appeals in that case is reported.

Boatmens Bank v. *Fritzlen,* 135 Fed., 650;
Boatmens Bank v. *Fritzlen,* 68 C. C. A., 288.

The effect of the judgment of reversal and remand in the replevin action was to reinstate that case in the Circuit Court of the United States, where it has ever since remained pending on the docket of that court. This judgment of reversal and remand was given by the Circuit Court of Appeals March 4, 1905, In the meantime, in April, 1904, when the order of remand by Judge Pollock was given, that order of remand was carried out by the re-docketing of this case in the District Court of Clark County, Kansas. Following the order of remanding and on May, 23, 1904, the Fritzlens filed in this case in said District Court, their motion asking said District Court to arrest the officers and attorneys of the bank on an alleged charge of contempt because of their having instituted said replevin action. (pp. 42-45, Rec.)

And on May 23, 1904, Fritzlens obtained an order, in the absence of the bank and its attorneys, by default, sustaining said motion, to the extent of ordering the officers of the bank to deposit the proceeds of the property replevined and sold in a bank at Ashland in said Clark County, Kansas, (p. 45-46, Rec.)

Afterwards, on the appearance of the bank and on its motion (pp. 55 to 60, Rec.), the said District Court

set aside said order, calling upon the bank to deposit the proceeds of its mortgaged cattle which it had replevined, in a bank at Ashland, Clark County, Kansas.

After this case was remanded to the District Court of Clark County, Kansas, the bank withdrew its demurrer to Weldon's petition and filed answer. (pp. 33-35, Rec.) The bank's answer (p. 34, Rec.) did not set up any new matter and pleaded negatively to the petition of Weldon, setting up in its answer its note for $32,920.15 and its prior and senior mortgages given to it by the Fritzlens, and its note and mortgages pleaded in Weldon's petition were set up as senior mortgages in bar of Weldon's petition in this case, asking a foreclosure of his junior mortgages from Fritzlen. Up to this time the Fritzlens had not filed any pleading, either by way of demurrer, answer, or motion, to Weldon's petition.

As we have seen, this action of Weldon's against Fritzlens and the bank was brought July 23, 1903, and down to May 26, 1904, (p. 52, Rec.) the Fritzlens had not filed any pleading of any sort to Weldon's petition. The bank, as we have seen, filed a demurrer to that petition on August, 1903, and after the remand withdrew that demurrer and filed an answer. The bank was brought into the case by publication, but the Fritzlens were served with process of summons by the Sheriff of Clark County, Kansas. The service on the Fritzlens by the Sheriff was on July, 23, 1903, the same day on which this suit was brought. (pp. 14-19, Rec.) So that, as we have seen, this suit was pending ten months before the Fritzlens filed any pleadings. There was no pleading filed in the case by the Fritzlens during the time from August, 1903 to April, 1904, during which this case was pending on the docket of the United States Circuit Court for the District of Kansas, but as soon as the order of remand in this case was sustained and carried into effect Fritzlen filed his answer. (pp. 47-52, Rec.) Prior to the

filing of that answer, so far as the pleadings in the case were concerned, the case stood upon the petition of Weldon and the demurrer of the bank. But the attitude of Fritzlen was fully disclosed when he filed his answer after the remand. On the same day, to-wit, May 26, 1904, that Fritzlen filed his answer Weldon filed his reply to the answer of the bank. The reply of Weldon filed the same day with Fritzlen's answer, tendered the same issue so far as the question of the validity of the Bank's mortgages were concerned. The answer of Fritzlen first admits the note and mortgage sued on by Weldon as against the Fritzlens for $3,750, and then proceeds to set out four causes of action against the bank. These causes of action are numbered, one, three, four and five and are set out in the same manner as they would be set out if Fritzlen had been suing the bank by a petition in an original action in either of the federal courts of Missouri or Kansas, where Fritzlen and the bank reside, or if the causes of action had been set forth in a petition by him in a state court.

The first two causes of action set out by Fritzlen in his answer, wherein he sets out his causes of action "against his co-defendant, the Boatmens bank," are based upon the proposition that the mortgages of the bank were void. (p. 47 to 50, Rec.) The first ground of action thus set up was based on the proposition that the Elmore & Cooper Live Stock Commission Company was a member of the Kansas City Live Stock Exchange, which exchange had been adjudged by the Supreme Court of Kansas to constitute a trust, in violation of the anti-trust laws of Kansas; *State* v. *Wilson*, 73 Kan., 343; that that commission company was a member of that exchange; that in the making of the loan by that commission company to Fritzlen hereinbefore stated, commissions were charged by the commission company from Fritzlen; that the rate of those commissions was fixed by

the exchange, in violation of the anti-trust laws of Kansas, and that therefore, since the loan of the commission company to Fritzlens included those commissions, that loan and mortgage given to secure the same to the commission company were void, and being void in the hands of the commission company, were likewise void in the hands of the bank as transferee of the commission company.

This ground of alleged invalidity of the mortgages of the bank was likewise set up in the reply of Weldon filed on the same day, as we have seen, with Fritzlen's answer. (p. 53, Rec.)

The second ground of action set up in the answer of Fritzlen as to the bank, and likewise set up in the reply of Weldon filed at the same time, pleaded that the bank had not complied with the foreign corporation laws of the State of Kansas, by registering its corporation as doing business in the State of Kansas as such foreign corporation. This ground of action, however, set up in the answer of Fritzlen, and in the reply of Weldon, was stricken out on motion of the bank, upon the ground that the laws of Kansas did not and do not require a foreign bank transacting business, as was done by the bank in this case, to register its incorporation in the State of Kansas as a foreign corporation.

The third cause of action set up in the answer of Fritzlen, being paragraph 4 (p. 50, Rec.), pleads as a ground of action against the bank an alleged contract between Fritzlen and the bank by which the bank was to furnish feed to Fritzlen for the feeding of the cattle, and further sets out the loss already stated herein of $20,000 to Fritzlen as a result of the storm of February, 1903; and that count in Fritzlen's answer concludes with an averment that Fritzlen had suffered damages to the extent of $20,000 for which it prayed judgment against the bank.

The fourth cause of action set up by Fritzlen in his answer, being paragraph 5 (p. 51, Rec.), prays judgment for $25,000, being the alleged value of the stock which that count and cause of action avers was converted by the bank in the bringing of its said action in replevin in the United States Circuit Court.

After the filing of the answer by Fritzlen and the reply by Weldon on May 26, 1904, the bank filed its second petition and bond for the removal of this cause to the United States Circuit Court. This second petition may be found from page 60 to 65 of the Record.

The general proposition upon which this second removal petition and bond were filed was that by the said answer of Fritzlen and reply of Weldon, filed at the same time, the entire nature of this case as disclosed by Weldon's original petition, was changed into causes of action in favor of Fritzlen against the bank, and the frauds of Weldon and Fritzlen in the bringing of this suit to prevent a removal were charged in detail.

This second removal petition and bond were heard by the District Court and overruled, that Court holding that, while the bond was sufficient, said second removal petition was not sufficient to authorize the removal. (p. 65, Rec.) The bank at the time excepted to the action of the court in denying and refusing said second petition for removal.

Thereafter issues were made up between Fritzlen and the bank as to the causes of action pleaded by him against the bank in his answer, and there were two trials. There was a jury trial between Fritzlen and the bank as to the common law cause of action for $20,000 damages on Fritzlen's fourth cause of action wherein he claimed damages against the bank because of the loss of his cattle and because of the alleged failure of the bank to furnish feed. This jury trial resulted in a verdict in

favor of Fritzlen against the bank for the sum of $4,100 (p. 79, Rec.), which verdict was given May 6, 1905, and judgment thereon given as a part of its decree by the court October 2, 1905.

After that jury trial, there was a trial to the court between Weldon and Fritzlen on the one hand and the bank on the other hand, as to the issue of the validity of the bank's mortgages. The court gave a final decree October 2, 1905. (pp. 66-81, Rec.) In that decree the Court made certain findings of fact (pp. 66-71, Rec.) and the Court also made certain couclusions of law. (p. 71, Rec.) In those conclusions of law the Court found that Fritzlen was not entitled in equity to a decree canceling the notes and mortgages held by the bank, but held that the note and mortgages held by the bank were void so far as they represented the commissions, for the sale of cattle charged to Fritzlen by the Elmore & Cooper Commission Company. The amount of those commissions was stated by the Court in its accounting in the decree (p. 72, Rec.) to have been $2,313.06. This is the amount at the time of giving the note to the bank, viz, November 30, 1901, and said amount with interest thereon to the time of the accounting on October 2, 1905, makes the total amount foot up about $3,000, which was the amount and sum in which the court reduced the indebtedness of the bank in favor of Fritzlen on account of those commissions. In the accounting there was also a reduction of about $1,000 which was claimed by the bank as a sum paid by it to Mr. Lukens as a superintendent placed on the ranch by the bank, with Fritzlen's consent, during the year 1903. These two reductions of the bank's claim foot up about $4,000, which, together with the amount of the verdict given for $4,100, makes altogether $8,100. The court in its decree held that the bank's mortgages were wholly valid as against Weldon (p. 79, Rec.) and

found the issues between Weldon and the bank in favor of the bank.

Motions for new trial by the bank were filed, in accordance with the rules of practice in the state court, and being overruled, the case was taken to the Supreme Court of Kansas. In that court the preliminary question argued by counsel and submitted to the court was, whether the trial court erred in overruling the bank's second petition for the removal of this cause to the said United States Circuit Court. In the submission of the case to that court, the bank also argued that the bank was not liable with respect to the cause of action for which a verdict of the jury had been given against it for $4,100, for the reasons hereinbefore given, and that the mortgages of the bank given by Fritzlen were valid in all respects and should have been enforced in all respects for the entire amount thereof, without any diminution on account of the commissions charged against Fritzlen by the Elmore & Cooper Commission Company.

Various grounds for the contention as to the validity of the bank's mortgages were argued by it in briefs and arguments filed by its counsel in the Kansas Supreme Court. One of those grounds was that the lapse of time between the charging of those commissions by the Elmore & Cooper Commission Company and the new loan of $32,920.15 by the bank to Fritzlen created a bar under the Kansas statute of limitations against Fritzlen.

Another ground was that, even if as between Elmore & Cooper and Fritzlen, the original transaction between them was infected with vice, the new transaction long thereafter, between the bank and Fritzlen, when the $32,920.15 note and mortgages were given, being founded upon a new consideration and a separate transaction from the original, was valid, whatever might be said or claimed about the original transaction between the commission company and Fritzlen.

Another ground set out and argued was that Fritzlen was barred by estoppel after the making of his note and mortgages direct to the bank, from maintaining that his prior note and mortgage to the Elmore & Cooper Commission Company were void wholly or partially.

Another ground maintained by the bank in its argument to the Supreme Court of Kansas was that Fritzlen was barred, not only by the statute of limitations of Kansas, but by laches, from coming forward with his claim at the present time that the bank's mortgages were void either in whole or in part.

Another point made by the bank was that, even if it was conceded that Fritzlen and the commission company were offenders against the law, the bank was not in *pari delicto* with either of them.

Another point made in the Supreme Court by the bank was that Fritzlen did not come into the case with clean hands, but neverthless seeks equity against a party who did come with clean hands. This point was sustained in the District Court. Nevertheless that court saw fit to hold in Fritzlen's favor that the bank's mortgage was invalid to the extent of commissions charged by the commission company.

Another point made by the bank was that it was an innocent purchaser for value without notice, of the commission company's paper given to it by Fritzlen.

Another point argued in the Supreme Court of Kansas by the bank was that Fritzlen had no right, under the code of Kansas or the rules of practice governing actions in courts, to engraft upon Weldon's case two distinct causes of action against his co-defendant bank one on contract and the other in tort, in which common law causes of action Weldon was in no wise interested and which common law causes of action had no relation whatever to the note and mortgages held by Weldon. That is

to say that Fritzlen's fourth cause of action for breach of contract was something he had no right to engraft on Weldon's suit; and that the fourth and last cause of action by Fritzlen for trover and conversion for the taking by the bank of the cattle on its Federal Court writ of replevin, subsequently to the bringing of this suit, was a matter which Fritzlen did not have the right to engraft on Weldon's suit.

The case thus presented to the Kansas Supreme Court involved, as we have seen, first, the question of removal, and, second, the above questions arising on the merits to be considered by that court in the event that the bank's contention for removal should be overruled.

The Kansas Supreme Court, after holding the case under advisement until April 6, 1907, reversed the said judgment of the District Court of Clark County, Kansas, on the ground that that court erred in denying the bank's second petition and bond for the removal of the cause to the United States Circuit Court. The order of submission and the judgment of reversal may be found at pp. 81-82 of the record. The opinion of the Kansas Supreme Court holding that this case was removable on said second removal petition extends from p. 82 to p. 93 of the record.

In this connection it should be stated that this case is here in this Court for the second time. On the giving of the judgment of reversal above rreferred to of the United States Circuit Court of Appeals for the 8th Circuit, these plaintiffs in error endeavored to obtain from this Court a writ of *certiorari* to reverse the judgment of said court of appeals and in the petition for the writ of *certiorari* all the grounds and contentions which were presented in arguments to the Circuit Court of Appeals were renewed to this Court, and there was on the part of the bank suggestions in opposition to the grounds of

the petition for the writ of *certiorari* contending that the Circuit Court of Appeals was right in its adjudication and opinion on the removal and other questions decided by it.

This petition of the Fritzlens for a writ of *certiorari* was denied by this court. *Fritzlen* v. *Boatmens Bank*, 189 U. S., 586, 587.

Since the case has come to this Court this, the second, time, the bank has filed a motion to dismiss the writ of error herein for want of jurisdiction. And this motion was, in October, 1907, by an order of this Court, continued until this final hearing of this cause, and said motion is pending now before this Court for determination on this final hearing.

We have in conclusion, then, two questions for the consideration of this Court. First, did the bank have a right to remove this cause on its second removal petition on the record as then made? Second, the Supreme Court of Kansas having affirmed and sustained the federal right claimed by the bank to the removal of this cause, does this Court have any jurisdiction on this writ of error to reconsider that action of the State Supreme Court?

POINTS AND AUTHORITIES.

I.

The controversy between Weldon and Fritzlen, citizens of Kansas, on the one hand, and the Boatmen's Bank, a corporation and a citizen of Missouri, on the other hand, respecting the alleged invalidity of the bank's mortgages on land and cattle situate in Clark County, Kansas, and situate also in the second United States Circuit Court Division of the District of Kansas, was cognizable and maintainable originally in an original suit which they might have brought against the bank in the United States Circuit Court sitting in that division to have those mortgages adjudged void. That was a controversy between citizens of different states involving more than $30,000 as value of the subject of controversy. Controversies between citizens of different states may be brought in a Federal Circuit Court of the district in which either party resides. Accordingly this suit, if considered as and held to be a suit *in personam,* was maintainable originally in the United States Circuit Court in Kansas for the said division in which the property was situated and in which Weldon and Fritzlen resided and to which court this suit was removed, or it could have been brought in the United States Circuit Court at St. Louis where the bank had its residence and domicile. If this suit be deemed a suit *in rem,* properly brought by publication against the bank, as was done in this case, then it was originally cognizable in said United States Circuit Court in Kansas and could have been brought in that court.

4 Fed. Stat. Ann., p. 380 to 385;
4 Fed. Stat. Ann., p. 265 and 266;
Greeley v. *Lowe,* 155 U. S., 58;
Dick v. *Foraker,* 155 U. S., 404.

II.

The controversy as to the validity of the bank's mortgages, therefore, being one between citizens of different states which could have been brought originally in the Kansas United States Circuit Court, was removable to that court by the Boatmen's Bank as the party who was a non-resident defendant in the case brought against it in the state court.

4 Fed. Stat. Ann., p. 312.

III.

It may be urged that that controversy was not removable in this case because it arose in a case wherein Weldon sought to foreclose his junior mortgages against Fritzlen. The answer to that is that Weldon did not have the right to make the senior mortgagee, the bank, a party to his suit to foreclose his junior mortgages against Fritzlen. The opinion of the United States Circuit Court of Appeals in this case and the cases decided by this court which are cited therein are conclusive that the bank was improperly and illegally made a party to this suit if it be considered a suit to foreclose junior mortgages.

Boatmens Bank v. *Fritzlen*, 135 Fed. Rep., 650, l. c., 569;

Same case, 68 C. C. A., 288, l. c., 297.

This decision received the sanction of this court by its refusal to grant a *certiorari*. *Fritzlen* v. *Boatmens Bank*, 198 U. S., 586, 587.

It follows that this suit, considered as a suit to foreclose a junior mortgage, is not maintainable or warranted by legal procedure against the bank, and the suit as against the bank is only maintainable considered only as a suit to procure a decree adjudging its mortgages void. A party cannot prevent the removal of a removable con-

troversy to a federal court by unlawfully uniting therewith another controversy, especially where that controversy is feigned and simulated between other parties. Particularly so in this case, for the reason that Weldon has no interest, legally or otherwise, in the bank's mortgages. There is nothing in the record to show, and there is no claim or pretense, that the property covered by both the bank's and Weldon's mortgages are insufficient to satisfy both the bank's and Weldon's debts. This being so, Weldon has no interest in the question of the validity of the bank's mortgages, and consequently, as this record amply shows, Weldon is only a formal party to that controversy.

IV.

But the other controversies in this case were also cognizable originally in, and therefore removable to, the Federal Circuit Court. The controversy tendered by Fritzlen's answer or cross-petition, as it is called, in the next to the last count thereof in which he asks judgment against the bank for $20,000 damages for breach of a contract to furnish feed for his cattle and on which count he recovered a verdict and judgment against the bank for $4,100, was a controversy between citizens of different states, which was removable to the Circuit Court. Weldon had no more interest in that controversy than in the other and his permission to Fritzlen to sue, on that cause of action, the bank which was a co-defendant, was quite as lawless as the making of a senior mortgagee a party to a suit to foreclose a junior mortgage.

Sec. 104 of the Kansas code provides as follows:

> "Where the answer contains new matter constituting a right to relief against a co-defendant *concerning the subject of the action*, such co-defendant may demur or reply to such matter."

This statute was designed to preserve the right of a defendant in an equity case, under the code, to file what under the old equity system was known as a cross-bill against a co-defendant where the subject matter of the cross-bill grew out of or was connected with the matter set up in the plaintiff's bill. Here there was no relation between Fritzlen's common law action in his answer for damages against the bank and Weldon's petition founded on his mortgages. The Kansas statute cited above furnished no authority whatever for the allowance by the District Court of the prosecution to judgment in this case, by Fritzlen of the common law actions set up against the bank in his answer.

V.

What is said in the next preceding point is also true of the last count in Fritzlen's answer or cross-petition in which he pleads a cause of action in *tort* for $25,000 damages against the bank, claiming that the bringing of the replevin action by the bank in the United States Circuit Court made the bank a *tort feasor* guilty of trover and conversion. This was also a removable controversy between Fritzlen and the bank in which Weldon had no interest. The statement of this alleged cause of action in Fritzlen's answer was not only lawless for the reason already given, but also for the further reason that the federal replevin suit was brought, and hence Fritzlen's alleged cause of action thereon set up in his answer arose some time after the bringing of this suit.

VI.

The contention that a plaintiff may at his pleasure prevent a removal of a case to a United States Circuit Court by the manner in which he frames his petition and brings his suit, applies to law actions and not to suits in

equity like the case at bar. Suits at law, whether they are *ex contractu* or *ex delicto* and excepting suits to cover specific property are money demands, in which the sole issue is whether the plaintiff or plaintiffs are entitled to recover a money verdict and judgment against the defendant or defendants, or whether the defendant or defendants shall have the verdict and judgment to go hence without day. Law actions are framed on the proposition that all the plaintiffs, where there is more than one plaintiff, have a joint interest in the money sued for, and that all the defendants are jointly liable therefor. This inflexible character of law actions gave rise to the rule which has been generally maintained by this Court, that a removable law action in which there are several plaintiffs and several defendants can only arise where all the plaintiffs are citizens of a different state or states from the state or states in which all the defendants are citizens. However, this Court finally recognized an exception and held that where in law actions the plaintiff and defendant were citizens of different states, but where, for instance, an employee of the defendant was improperly joined by plaintiff with the non-resident defendant, the principal defendant could nevertheless remove the case. *Powers vs. R. R. Co.*, 169 U. S., 92.

But the inflexible rule as to removals of inflexible law actions which generally obtains does not apply to removals of suits in equity. Indeed, it was the fixed and rigid character of law actions that gave rise far back in history to our suit in equity and to its widely comprehensive, ever varying and flexible character. In equity suits parties who are principals to the controversy or controversies in the case and who are interested on the side of the plaintiff are frequently joined by the plaintiff's attorney with adversary defendants. The rules as to parties in suits in equity have always been different from the rules as to parties in law actions, and the rule

of this Court long since made as to removals in suits in equity, unlike its rule as to removals in law actions, requires the federal court on the hearing of a motion to remand in this class of cases, to disregard the action of the pleader and his arrangement of the parties, and to examine and scrutinize the entire record in the case in connection with the removal petition, with the view of determining not only what is the true and real controversy or controversies in the case, but the relations of the several parties thereto and whether the controversy or controversies in the case are between citizens of different states.

Removal Cases, 100 U. S., 457;
R. R. Co. v. *Ketchum,* 101 U. S., 289;
Harter v. *Kernochan,* 103 U. S., 562;
Evers v. *Watson,* 156 U. S., 527;
Dawson v. *Trust Co.,* 197 U. S., 178.

This rule is in harmony with that part of Section 5 of the removal act of March 3, 1875, which was continued in force by the removal acts of 1887 and 1888, wherein it is provided as the test of Jurisdiction of the United States Circuit Court in both original and removed cases that the suit does *"really* and *substantially* involve a dispute or controversy properly within the jurisdiction of said Circuit Court."

4 *Fed. Stat. Ann.,* p. 371.

The rule thus made by this Court requiring in this class of suits the circuit courts to examine the case and re-arrange the parties according to this real relation to the controversy, was followed by Judge Lochren in his order (Record, pp. 30-31) overruling the motions to remand in this case, and his action received the approval of the United States Circuit Court of Appeals in its decision.

VII.

Although the order of remand made by Judge Pollock on the bank's first removal petition and bond was, as we submit, wrongful, erroneous and improperly made, as the Circuit Court of Appeals decided, and although the effect of that order of remand was to re-transfer the case back to the Clark County District Court, as was done in this case, still the bank became entitled to a subsequent removal after that remand of the case to the federal court on its second removal peition and bond, if the case was so changed in the state court after the order to remand was carried into effect as to warrant a removal on account of such change. This is the settled law and rule as made by the decisions cited in this brief and argument, and also cited in the opinion of the Supreme Court of Kansas in this case, which has been published as follows:

Boatmen's Bank v. *Fritzlen*, 89 Pac. Rep., 915;
Same case, 75 Kan. Rep., 479;
Same case (Record herein, p. 82);
Same case (Motion of the bank to dismiss for want of jurisdiction herein, p. 11).

Whether the order to remand on the bank's first petition was rightly or wrongly made, still the case was thereafter removable on the second petition and bond, if the changes made after the remand made it a removable case.

Powers v. *R. R. Co.*, 169 U. S., 92.

It cannot be denied that such changed condition making it a removable case after the remand was carried into effect would have warranted the removal on the second petition, if the remand had been proper, and if the remand was erroneous and improper, then the wrong on the bank committed by the procuring of that order by plaintiffs in error cannot avail in their behalf, if the changes which they subsequently made in the case in the state court after the remand was carried into effect by the re-docketing of

the case in the state court created new grounds of removal independent of the grounds warranting the removal on the first petition. The Kansas Supreme Court, as will be seen from its opinion, seems to have held, although perhaps not explicitly, that the case was not removable on the first petition, but whether such holding would have been correct or not, still the removal on the second petition which that court adjudged, must be sustained if apart from the grounds of the first removal petition, the grounds of the second removal petition were separate, apart from and additional to and independent of the grounds of the first petition. A party can never profit by his own wrong and it weakens instead of helping the case of the plaintiffs in error on the second removal petition, if they wrongly and in violation of the rights of the bank under the Constitution and laws of the United States procured the remand, especially when it is considered, as was said by the United States Circuit Court of Appeals, that there is no appeal from the order of remand, and that in this case the remand was given full and immediate effect. Two wrongs never make a right, and the removal on the second petition ought not to be denied because the remand on the first petition was wrong. Did this case then, as held by the Kansas Supreme Court, become removable on the new grounds of the second removal petition arising after the remand was carried into effect.

VIII.

The charge in Weldon's petition against the bank was very meager. All that is therein pleaded (p. 13, Rec.), is that the bank's mortgages were "pretended," that the bank "has no right, title or interest" in the said personal or real property; that the bank's mortgages grew out of "certain transactions" with Elmore & Cooper which were "illegal and void"; that the bank's mortgages were "void, illegal and of no effect"; that the bank's

claim was by virtue of "pretended, illegal and void mortgages."

This is all that is said in Weldon's petition as to the invalidity of the bank's mortgages. This very general and wholly insufficient form of statement of a cause of action against the bank was not remedied unitl after the remand of the case from the federal court. The answer of Fritzlen filed after the remand made as to the causes of action therein against the bank, him (Fritzlen), the plaintiff and the bank the defendant. The proceedings on the jury and court trials of the issues made by the Fritzlen answer all show that Fritzlen by his answer was made and became the plaintiff in the case and that thereby the bank became and was made a defendant to said causes of action of Fritzlen instead of a defendant to Weldon's petition. The proceedings at said jury trial that are recited in this record (pp. 106 to 114, Record), show Fritzlen to have been the plaintiff and the bank the defendant. The same is true of the proceedings of the court trial recorded in the court's decree (pp. 66 to 81, Record). These proceedings based on Fritzlen's answer were conducted the same as if Weldon had been in China or present as a mere spectator. He had no interest, legal or equitable, in any of Fritzlen's causes of action which were tried by the court and jury and his attitude in the case was that of a person prosecuting a suit as a next friend for another. The views of the Kansas Supreme Court, in the latter part of its opinion, that by the filing of Fritzlen's answer the case became so changed as to make Fritzlen the plaintiff and to make the case a cause then removable by the bank, cannot as it seems to us be successfully answered. In addition to the authorities cited in that opinion which hold that a case may be removed after being remanded, whenever by any change during its pendency thereafter made, it becomes removable, we cite the following:

Cuyler v. *Smith*, 78 Ga., 662; 4 S. E. Rep., 106;
Huskins v. *R. R. Co.*, 37 Fed. Rep., 504;
Evans v. *Dillingham*, 43 Fed. Rep., 177;
Yarde v. *R. R. Co.*, 57 Fed. Rep., 913, l. c., 915;
Cookerly v. *R. R. Co.*, 70 Fed. Rep., 277;
Bailey v. *Mosher*, 95 Fed. Rep., 223;
Fogarty v. *Sou. Pac. Co.*, 121 Fed. Rep., 941;
Black's Dillon on Removal of Causes, Sec. 151 to 163;
Dudley v. *R. R. Co.*, 96 S. W. (Ken.), 835;
Underwood v. *R. R. Co.*, 103 S. W. (Ken.), 322;
Clinger v. *R. R. Co.*, 109 S. W. (Ken.), 315.

The two causes of action of Fritzlen for damages against the bank were separable controversies entitling the bank to a removal on that ground alone. The cause of action to adjudge its mortgages void was also separable entitling it to a removal.

The removal on the second removal petition was not only proper because of Fritzlen's two new causes of action for damages set up in his answer, but also because of his cause of action to adjudge the bank's mortgages void, the full nature of which as a removable controversy was purposely concealed until after the remand and not disclosed until the filing of Fritzlen's answer, and Weldon's reply. (*Dudley* v. *R. R. Co.*, 96 S. W. Rep., 835; *Underwood* v. *R. R. Co.*, 103 S. W. Rep., 322; *Clinger* v. *R. W. Co.*, 109 S. W., 315.)

IX.

The badges of fraudulent endeavor to take away and deprive the bank of its right to a removal given it by the Constiutuion and laws of the United States and which fraud was charged in the removal petitions and was found and adjudged by both the Supreme Court of Kansas and the Circuit Court of Appeals, are not a few.

a. The making of the Weldon note and mortgages by Fritzlen and the bringing of this suit thereon by Weldon, all within the space of twenty-one days, is one of them.

b. The doing of those acts after the controversy arose in March, 1903, between Fritzlen and the bank respecting Fritzlen's loss of cattle, is another.

c. The generality and insufficiency of the charge against the bank's mortgages in Weldon's petition, is another.

d. The illegality and consequent wrongfulness of joining the bank, a senior mortgagee, in the Weldon foreclosure suit, of Weldon's fraudulent junior mortgages, is another.

e. The fact that Weldon did not take judgment by default against Fritzlen for ten months after service of sumons on Fritzlen, is another.

f. The fact that Weldon permitted Fritzlen to answer, setting up for the first time his causes of action against the bank after the remand had been carried into effect, is another.

g. The concealment contrary to usual and customary legal procedure until after the remand, by both Weldon and Fritzlen of the attacks they intended to make on the bank's mortgages, is another.

h. The fact that the grafting of Fritzlen's causes of action against the bank onto this fraudulent suit of Weldon's, one of those causes of action arising after the bringing of this suit, was opposed to law and the rules of legal procedure and was therefore illegal, is another. Acts that are illegal are *per se* fraudulent, and acts that are not in harmony with custom and usage are presumed to be so.

i. The fact that in all the controversies in the case in all the courts, the District Court of Clark County, Kansas, the United States Circuit Court for the district of

Kansas, the United States Circuit Court of Appeals, the Supreme Court of Kansas, and on both appeals to this court, Fritzlen has been the principal contestant against the bank, both on the question of removal and on the merits, is another badge. The contesting and opposition by one defendant of and to the removal of the case to a federal court by his co-defendant certainly presents a rare and curious spectacle. Weldon joins Fritzlen on this writ of error (pp. 95 to 103, Record).

j. The fact that there is no controversy between Weldon and Fritzlen, although one was counterfeited and sought to be simulated at the trial (pp. 105, 106, 14, 47, 107, Rec.), is another.

k. Respecting the last one of Fritzlen's causes of action for $25,000 because the bank replevied the cattle, a removal as to that cause of action in this case could not have been taken until after the accrual of that cause of action which accrued after the bringing of this suit. That is another badge.

X.

Since in this case the substantive ground of diversity of citizenship existed, the question of time of presenting the second removal petition or of the particular court to which the removal should go, were mere model or formal matters, which plaintiffs in error might waive. On this point, the recent decisions of this Court are explicit and final.

In re Moore, 28 Sup. Ct. Rep., p. 585;
In re Nebraska (Id.) p. 581.

The decisions of this Court cited in the opinion of the Kansas Supreme Court are also explicit that these plaintiffs in error became estopped by their acts specified in the next preceding point herein from making the objection that the second removal petition was not filed in time.

Estoppels resulting from illegality and wrong are much more binding than mere waivers or an acquiescence. Apart, however, from the view of estoppel, the Kansas Supreme Court was right in holding that Fritzlen's answer was the same as an original petition and that the bank's second removal petition which was filed immediately after the filing of that answer, was filed in time. Indeed Fritzlen's last cause of action for $25,000 accrued after the bringing of this suit.

Practically considered, Weldon has been nothing in this case but a next friend for Fritzlen in his prosecution against the bank. Fritzlen is the real plaintiff in this case, Weldon his next friend. If the prosecution of such a case in that way can avail to prevent the removal of this cause, then it follows that removals in all cases can be prevented by like proceedings.

If in any case there is a controversy between A, a citizen of Kansas, and B, a citizen of Missouri or Illinois, all that A need to do to prevent a case brought by him from being cognizable in the Federal Court if this case is not removable would be to have his suit brought by C as plaintiff against A and B as defendants so that A could prosecute his controversy with B in the state court in the case brought by C, in order to prevent the removal of the case to the Federal Court.

Such a holding would make the nullification of the constitution and the laws of the United States complete, and the right of the non-resident creditor, who was given the valuable right of removal of his cause to a court free from local prejudice and influence by our fathers in the Constitution and by the Congress of the United States in the statutes enacted from time to time, would also be of no avail, and all attempts to repudiate the honest debts of non-resident creditors would have free course.

XI.

However, this Court has no jurisdiction on this writ of error to decide this case, and the writ of error herein should be dismissed because of the reasons given and authorities cited in our motion to dismiss the writ of error herein for want of jurisdiction, which motion, submitted at the last term, was not then passed upon, but continued by the Court to this final hearing.

In addition to the authorities cited by us in that moion, we cite here the following, viz:

Cooley's Const. Lim. (7 Ed.) p. 31;
Gordon v. *Caldaugh*, 3 Cranch, 268;
McDonough v. *Willandon*, 3 How., 693;
Fulton v. *McAfee*, 16 Pet., 149;
Burke v. *Gaines*, 19 How., 388;
Hall v. *Gaines*, 22 How., 144;
Redeell v. *Bryan*, 24 How., 420;
Roosevelt v. *Meyer*, 1 Wall., 512;
Ryan v. *Thomas*, 4 Wall., 603;
R. R. Co. v. *Plainview*, 143 U. S., 390, 391;
Bank v. *Ballorny*, 150 U. S., 85, 88;
Powder Works v. *Davis*, 151 U. S., 389;
Domer v. *Richards*, 151 U. S., 658;
Savoyard v. *Denny*, 158 U. S., 180;
Palmer v. *Hussey*, 119 U. S., 96, 98;
McCormick v. *Bank*, 165 U. S., 546;
Conde v. *York*, 168 U. S., 650;
R. R. Co. v. *Morgan*, 160 U. S., 288.

In point 2 of the following argument we will further amplify our views on this point. Briefly stated this point is that since the Kansas Supreme Court upheld and decided in favor of and not against the federal right of removal, a writ of error does not lie to review that decision.

ARGUMENT.

I.

The filing in this case on May 26, 1904, by defendant Fritzlen of his separate answer, converted and changed this case into a controversy between him and the Boatmens Bank, so as to make the case removable on the bank's second removal petition and bond filed June 10, 1904. If that answer of Fritzlen's converted and so changed the cause into an action between him and the bank, the case then, according to the authorities, became removable and the second removal petition should have been granted.

The first paragraph in Fritzlen's answer confesses the note and mortgages which he had given to Weldon, on which this suit was brought by Weldon. Indeed, as Fritzlen did not swear to his answer, Weldon's note and mortgages stood confessed, but Fritzlen expressly acknowledged and confessed in the first paragraph of his answer the execution of the note and mortgages sued on by Weldon, and said first paragraph of Fritzlen's answer shows that in point of fact there never was any controversy in the case between him and Weldon. It is true that in said paragraph 1 something is said by Fritzlen about interest, but he confesses that he gave Weldon the $3,750 note, and the terms and language of that note prescribed the interest payable thereon. The case therefore as between Weldon and Fritzlen, was a mere moot case containing no real controversy. That paragraph left nothing for trial between Weldon and Fritzlen. Weldon was entitled to judgment against Fritzlen on the pleadings. There was nothing between them for a jury to try. This is further demonstrated by the mock trial between those parties. Although Fritzlen and Weldon went through the mock trial, Fritzlen, at that trial,

as he did in the first paragraph of his answer, confessed the cause of action against him sued on by Weldon.

In the Record of the Kansas Supreme Court consisting of 853 pages, (p. 106, Rec.) only a part of two pages is occupied, being pages 292 and 293 of the Record, in the mock or moot trial between Weldon and Fritzlen, and after asking Fritzlen a few questions as a witness, his counsel confesses that the jury may give a verdict in favor of Weldon against Fritzlen for the amount of the note sued on by Weldon. We repeat, there was no necessity of having this matter submitted to a jury, Weldon being entitled on the pleadings to judgment against Fritzlen for the amount of his note and the foreclosure of his junior mortgage confessed by Fritzlen in his answer. So that, as we have seen, the answer of Fritzlen by its first paragraph, shows that there was no controversy between him and Weldon. Indeed there never was any controversy between them. Following said paragraph, in said answer, Fritzlen then proceeded to state four alleged causes of action against the bank, by paragraphs 2, 3, 4 and 5 of that answer.

Those paragraphs numbered 2, 3, 4 and 5 in the answer of Fritzlen, are the same in form and substance as if Fritzlen had commenced a suit by petition against the bank in an original suit. Each of those four paragraphs and the several causes of action therein pleaded are directed against the bank and none of them against Weldon. Those four paragraphs changed the entire cause from one as between Weldon and Fritzlen, to one between Fritzlen and the bank. A comparison of Fritzlen's answer with the pleadings in the case which had before that time been filed, will show that that answer completely revolutionized the case from the case as brought by Weldon to one between Fritzlen and the bank. After Fritzlen's answer was filed, the only controversies in the case were those between the bank on the one hand,

and Fritzlen, either alone or considered in connection with Weldon, on the other. The cause of action set up in the second and third paragraphs of Fritzlen's answer are the same matters pleaded by Weldon in his reply, which was filed the same day of Fritzlen's answer. (pp 47 to 54, Rec.) As to those matters pleaded in the second and third paragraphs of Fritzlen's answer and in Weldon's reply, it cannot be denied that on the face of those pleadings those controversies were between Weldon and Fritzlen on the one side, and the bank on the other side. As to the controversies pleaded by Fritzlen in the fourth and fifth paragraphs of his answer, Weldon has no possible interest in them. The cause of action pleaded in the fourth paragraph of his answer is a suit and action at law for damages for $20,000 for an alleged breach by the bank of a contract alleged to have been made by it with Fritzlen to furnish feed for Fritzlen's cattle. The cause of action pleaded by Fritzlen in the fifth paragraph of his answer, is a suit and action at law for damages amounting to $25,000 for the conversion by the bank of Fritzlen's cattle in October, 1903, after the bringing of this suit, when it took the cattle in the federal court replevin suit. The controversies pleaded by Fritzlen in the fourth and fifth paragraphs of his answer are causes of action and controversies wholly and solely between him and the bank. That answer showed that all the controversies in the case were between citizens of different states. The bank after the filing of that answer and reply on May 26, 1904, had the right to file its second petition for removal. As to those controversies pleaded in the second and third paragraphs of Fritzlen's answer and in Weldon's reply, it cannot be denied that they were controversies wholly between Weldon and Fritzlen, citizens of Kansas, on the one side, and the bank, a citizen of Missouri, on the other side. As to the controversies pleaded by Fritzlen in the fourth and fifth paragraphs of

his answer, we have seen that there were wholly and solely between him and the bank. Therefore the case as changed and made by Fritzlen's answer and Weldon's reply, filed May 26, 1904, became a removable one on the filing of the second removal petition and bond filed by the bank. And this is so, irrespective of the question whether the case was or was not removable on the first removal petition and bond.

It is well settled that if a case becomes removable at any time during its pendancy, it may be removed by petition and bond filed by the party entitled to the removal. And the authorities all agree that if the bank was entitled to a removal when it filed its second petition and bond, on June 10, 1904, the case then became removed to the Federal Court, and the State Court was without further jurisdiction in the case. If then the case, on the filing of Fritzlen's answer and plaintiff's reply, became transformed into an action and controversy on the record between Fritzlen and the bank, or between Fritzlen and Weldon on the one side and th bank on the other side, then the case became removable and was removable when the second removal petition and bond were filed. The proposition that if a case becomes removable at any time during its pendancy, it may be removed by the filing of a petition and bond, even where, as in this case, it has been removed on the first petition and bond, and then remanded, has been sustained by numerous authorities.

In the case of *Cuyler* v. *Smith*, 78 Ga., 662, 4 S. E. Rep., 106, which was decided by the Supreme Court of Georgia, it appears that of the two plaintiffs in the case, one was a citizen of New Jersey and one of Georgia, and that the defendants were all citizens of Georgia. The Court refused to transfer the case to the United States Court, whereupon the plaintiffs dismissed the suit as to

the plaintiff who was a citizen of Georgia, leaving the suit one between the plaintiff who was a citizen of New Jersey and the defendants who were all citizens of Georgia, and the court held that after the case got into that condition it was in a condition then to be removed to the United States Circuit Court, and accordingly the Georgia Supreme Court reversed the judgment of the trial court, and held that the case had been removed after the dismissal of the Georgia party as a plaintiff in the case on the filing of the removal petition thereafter.

So in *Huskins* v. *Railway Co.*, 37 Fed. Rep., 504, it was adjudged by the Circuit Court of the United States in Tennessee, as follows: "Under the removal act, authorizing the defendant to file his application on the ground of diverse citizenship in the state court at any time before he is required to plead or answer the complaint, where, on the last day of the term of the state court, and after the time to answer or plead, the complaint is amended, demanding $10,000 instead of $2,000, a petition for removal to the federal court before the next term of the state court is filed in time."

So in the case of *Evans* v. *Dillingham*, 43 Fed. Rep., 177, it was adjudged as follows: "Where an amended petition is filed which makes a substantially different suit from that stated in the original petition, the time for removing the cause is to be calculated with reference to the amended petition." The opinion in the case was delivered by Judge McCormack, who is now one of the Judges of the United States Circuit Court of Appeals of the Fifth Circuit. In the opinion in that case the Court says: "There is no question in my mind that where an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading of the plaintiff. As an

illustration of the ~~property~~ priority and necessity for so holding, take the case where a party sues in the state courts, alleging the cause of controversy to be of less value or not of greater value than $2,000, and after the return term and after the defendant has answered the plaintiff files an amended petition, setting up the same cause of action but claiming damages in a sum exceeding $2,000, can it be doubted that if the state of the parties or the cause of action be such as to have given the right to remove had the amount in controversy been sufficient to give this court the jurisdiction, the defendant would not be denied his right to remove because the time within which he was required to answer the original peition had passed? I am of opinion that the defendant's application for removal was made in time and the motion to remand will be refused."

In the case of *Yarde* v. *Baltimore & O. R. R. Co.*, 57 Fed. Rep., 913, l. c. 915, which was a case decided by the United States Circuit Court for the District of Indiana, the court in its opinion said: "The right of removal is secured by the Constitution and laws of the United States whenever the requitise diversity of citizenship exists and the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000. *This right cannot be defeated by any artifice, evasion or omission.* If at any time during the progress of an action in a state court, by amendment *or otherwise*, a cause of action not before removable is changed or converted into one which is properly removable, the defendant, whether an alien or a citizen of another state than that of which the plaintiff is a citizen, has the right to file his petition and bond and secure a removal of the cause into the proper federal court. It has often been held that if the defendant have a right to the removal, he cannot be deprived of it by the allowance by the state court of the

amendment reducing the sum claimed, after the right of removal is complete. *Kanouse* v. *Martin,* 15 How., 198. The converse of this proposition must be true—that a defendant not entitled to removal, who becomes entitled to it by reason of an amendment of the complaint allowed by the state court, may remove the cause, although the time has elapsed within which his removal of the cause ought to have been asked for, if he promptly files his petition and bond after such amendment has been made."

In this case Weldon and Fritzlen, by their reply and answer filed May 26, 1904, changed the cause into a new case.

In the case of *Cookerly* v. *Railway Co.,* 70 Fed. Rep., 277, it appeared that the plaintiff, who was a citizen of the State of Washington, commenced an action in the United States Circuit Court for that state, to recover damages on account of a death, against a railway company which was a Minnesota corporation, and also against other parties as defendants who were citizens of said State of Washington, and on the trial of the case a motion for non-suit as to the defendants who lived in Washington was granted, leaving the suit to stand alone between the plaintiff as a citizen of Washington, and the defendant as a citizen of Minnesota, and in that state of the record on plaintiff's motion he was given leave to file an amended complaint against the Minnesota Railway Company, which was required to answer within the time fixed. Thereafter plaintiff filed the amended complaint and before the expiration of the time to answer the same the railway company filed a petition and bond for the removal of the cause to the federal court. The question in the case was upon the removal of the cause. The court held that the railway company's application to remove the cause was made in time, having been

presented as soon as the disability imposed upon it by the plaintiff's joining the resident defendants was removed.

In the case of *Bailey* v. *Mosher,* 95 Fed. Rep., 223, which was decided by the United States Circuit Court of the District of Nebraska, it appears that in the action in the state court in Nebraska against officers of a national bank, the parties being citizens of the same state, defendants filed a petition and bond for removal on the ground that the action was based on the laws of the United States. The application was denied, and on the filing of the record in the federal court, that court sustained a motion to remand on the ground that plaintiff"s petition did not count upon the congressional statute but upon the common law. Subsequently plaintiff amended his pleading by adding allegations showing that he in fact relied upon a violation by defendants of their duty as officers of a national bank. On the making of a second amendment by plaintiff and within the time allowed for pleading thereto, defendants filed a second petition for removal. It appears that the second amendment in the case was substantially the same as the first amendment. The original petition counted upon a liability at the common law. The first amended petition counted upon a liability arising under the laws of Congress. The second amended petition counted upon the same cause of action as the first amended petition. After the filing of the second amended petition the defendant filed a second petition and bond for the removal of the case, and the court in that case, in an opinion delivered by Judge Shiras, held that the right of removal was not lost by the lapse of time since the first application, and that it was not waived by failing to file a renewed application on the making of the first amendment, since the first petition, which remained on file in the case, became effective

as soon as it appeared that the cause was removable. In that case it was held by Judge Shiras that although the cause was remanded on the first petition and bond, still, when the case became a removable one by filing the amended petition stating a cause arising under the laws of the United States, then the case became removed by virtue and under operation of the first petition and bond, which was still on file in the case.

In the case of *Guarantee Company* v. *Hanway,* 104 Fed. Rep., 369; 44 C. C. A., 312, the Circuit Court of Appeals adjudged the following: "Where a case is not removable when the time for its removal prescribed in the acts of Congress expires, but subsequently becomes removable by amendment *or otherwise,* the filing of a petition and bond for removal within a reasonable time thereafter entitled the petitioner to a transfer of the case to the Federal Court."

The opinion in that case was delivered by Judge Sanborn, Judges Caldwell and Thayer concurring.

That was an action by the Guarantee Company against Hanway. As appears from the statement of facts in the case, on April 16, 1898, the plaintiff filed an amended complaint, charging that the defendant made the contract sued on, in his, the defendant's official capacity, as shareholders' agent of the National Bank of North Dakota, and prayed judgment against him as such agent and not against him personally, as was done in the original petition. The original cause of action in the first petition was against Hanway personally, while the cause of action stated in the amended petition was against him as agent of the National Bank, and in that way the amended petition stated a case arising under the laws of the United States. After the filing of the amended petition and within due time the defendant filed a petition removing the case to the United States Circuit Court, and

the question in the case was as to the effect of this removal.

In the opinion in that case the court says: "Another objection to the jurisdiction of the court is that the case was not removed until after the time had passed within which the defendant was required by the laws of the State of North Dakota to answer or plead to the original complaint in the action. But the original complaint stated no cause of action against the defendant as the shareholders' agent. It was not until the amended complaint was filed that such a cause of action was stated, and it was then that a case first arose under the laws of the United States. The petition and bond for removal were presented within the time prescribed for answer or plea to the amended complaint. Where a case is not removable when the time for its removal prescribed in the act of Congress expires, but subsequently becomes so by amendment or other action, the filing of a petition and bond for its removal within a reasonable time after it becomes removable entitles the petitioner to its removal. *Powers* v. *Railway Co.*, 169 U. S., 92, 101; 18 Sup. Ct., 264; 42 L. Ed., 673; *Bailey* v. *Mosher*, (C. C.) 96 Fed., 223; *Speckart* v. *Bank*, (C. C.), 85 Fed., 12. None of the pleadings in this case were filed in the court until long after its removal from the state court, but the statutes and practice of the State of North Dakota did not require them to be filed, inasmuch as they were served upon the opposite party. Moreover, the time and manner of the presentation of the pleadings and the petition relate to the form and method of the proceeding, and not to the essentials of the right of removal."

In the case of *Fogarty* v. *Southern Pac. Co.*, 121 Fed. Rep., 941, which was decided by the United States Circuit Court in California, in the opinion delivered by Circuit Judge Ross of that circuit, it was held as fol-

lows: "In an action in a state court against a citizen of the state and a citizen of another state, the suit was dismissed as against the citizen of the state but no notice of such dismissal was served on the other defendant, and thereafter, while ignorant of the dismissal, it requested a change in the time fixed for the trial of the cause, held, that it had not waived its rights to a removal. The motion for removal, having been granted ninteen days from the dismissal, will be held to have been made within a reasonable time after the right of removal arose, thought it did not appear when the moving party learned of his right to remove, or when the petition for removal was filed."

See also Black's Dillon on Removal of Causes, Secs. 151 to 163.

In the case of *Northern Pac. Ry. Co.* v. *Austin*, 135 U. S., 315, it apeared that in that case, which was brought in a state court in Minnesota, an amendment to the complaint in the action was allowed by the court after the evidence was in, by which the amount of damages claimed was increased from a sum too small to allow the defendant to remove the case to the United States Court, to a sum in excess of the jurisdictional sum necessary for that purpose, and this Court, in an opinion delivered by Chief Justice Fuller, held that if the defendant had filed a petition and bond for a removal of the case, after the amendment was made, the removal would have been allowable and would have been sustained, but that, having failed to file such removal petition and bond after the amendment the party was not entitled to remove the case. The appeal in that case was from the Supreme Court of Minnesota. In the opinion in the case this Court (p. 318), says: "Nothing is better settled than that to enable us to take jurisdiction on the ground of the denial by a state court of a right

claimed under a statute of the United States, the record must show that the right was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Spies* v. *Illinois*, 123 U. S., 131; *Chappell* v. *Bradshaw*, 128 U. S., 132. As the defendant did not apply for the removal of the cause, the right now claimed under the statute was not denied by the district court, nor by the Supreme Court in affirming the judgment. If the application had been made, the question would then have arisen, whether it came too late under the circumstances. The defendant was not entitled to remove the suit as originally brought, 'before or at the term at which such cause could be first tried, and before the trial thereof.' But the objection to removal was obviated by the amendment. As the time within which the removal must be applied for is not jurisdictional, but model and formal, (*Ayres* v. *Watson*, 113 U. S., 594, 598), it may, though obligatory to a certain extent, be waived. And as, where a removal is effected, the party who obtains it is estopped upon the question of the time, *so if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him.*"

See also *Martin* v. *Railroad Co.*, 151 U. S., 673, l. c., 688 to 691; *Connell* v. *Smiley*, 156 U. S., 335.

In the case of *Powers* v. *Railway Co.*, 169 U. S., 92, it appears that that suit was brought in a state court in Kentucky by Powers, to recover damages against the railway company and also against three other defendants, who were the conductor, engineer and fireman of the railway company. Powers, the plaintiff, was a citizen of Kentucky, and the railway company was a corporation of Virginia. The other defendants sued with the railway company were also citizens of Kentucky. A petition

and bond for the removal of the cause was filed by the railway company, but upon the filing of the transcript in the United States Circuit Court the suit on motion to remand was remanded to the state court. After the case was remanded to the state court the plaintiff dismissed the action as against the individual defendants who were citizens of Kentucky, leaving the case to stand between Powers, the plaintiff, who was a citizen of Kentucky, and the defendant railway company, a citizen of Virginia. Thereupon the railway company filed a second petition and bond for removal. The question in the Supreme Court of the United States was whether this second removal petition and bond were proper and had the effect of removing the case. In that case this court in its opinion, which was delivered by Mr. Justice Gray, says: "Undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the state to make any defense whatever in its courts. *Edrington* v. *Jefferson,* 111 U. S., 770; *Baltimore & Ohio Railroad* v. *Burns,* 124 U. S., 165; *Kansas City, etc. Railroad* v. *Daugherty,* 138 U. S., 298; *Martin* v. *Baltimore & Ohio Ry.,* 151 U. S., 673, 686, 687. But it by no means follows, when the case does not become in its nature a removable one until after the time mentioned in the act has expired, that it cannot be removed at all. In *Northern Pacific Railroad* v. *Austin,* 135 U. S., 315, where a plaintiff suing in an inferior court of a state had laid his damages at less than the sum necessary to authorize a removal into the Circuit Court of the United States and was permitted at the trial to increase the *ad damnum* above that sum, and the judgment of the district court was affirmed by the highest court of the state, a writ of error of that court was dismissed by this court, solely because no application for removal had been made

after the allowance of the amendment; and the Chief Justice, in delivering the opinion, said: 'If the application had been made, the question would then have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit as originally brought, 'before or at the term at which such cause could be first tried, and before the trial thereof.' But the objection to removal, depending upon the absence of the jurisdictional amount, was obviated by the amendment. As the time within which a removal must be applied for is not jurisdictional, but model and formal, *Ayers* v. *Watson*, 113 U. S., 594, 598, it may, though obligatory to a certain extent, be waived, and as, where a removal is effected, the party who obtains it is estopped upon the question of time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him.' 135 U. S., 318. The question whether a defendant may file, in the state court in which the suit was commenced, a petition for removal, after the time mentioned in the act of Congress has elapsed, in a case which was not removable when that time expired, is now directly presented for adjudication; and the answer to this question depends upon the terms and effect of the act in force when these proceedings took place. In order to warrant a removal from a court of a state into a Circuit Court of the United States, according to the terms of that act, the necessary diverse citizenship or other foundation of the jurisdiction of the Circuit Court of the United States must exist. It is only when that does exist, that 'any party entitled to remove any suit' 'may make and file a petition in such suit in such state court at the time, or at any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff,

for the removal of such suit into the circuit court to be held in the district where the suit is pending,' and to give bond to file a copy of the record in that court 'on the first day of its then next session." Act of March 3, 1887, c. 373, as corrected by act of August 13, 1888, c. 866; 25 Stat., 435. This provision clearly manifests that intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But, so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it, and the provision of the act of Congress, that 'any party entitled to remove any suit,' 'may make and file a petition for removal' at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would ont only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same state as the plaintiff were joined with the defendants through an honest mistake not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than $2,000, and was afterwards discovered to be so much graver, that there could be no doubt of the power and the duty of the court to allow an amendment increasing the *ad damnum*. The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enact-

ment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought. The result is that, when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time."

In the case of *Yawkee* v. *Richardson*, 9 Mich., 528, it appears that the plaintiffs in that action brought an action of *assumpsit* in a state court in Michigan against a single defendant, a citizen of another state, who thereupon applied for an order removing the cause to the United States Court. This application having been decided in his favor, the plaintiffs, before the order was entered, discontinued the action and brought a new suit in the state court against the same defendant and also against another person, a citizen of the same state with themselves, for the same cause of action. When this suit came on for trial, the plaintiffs introduced evidence which related exclusively to dealings with the defendant first sued in the first action, and then presented a stipulation with the co-defendant some time before that the suit be discontinued as to him, and the discontinuance was granted. The Supreme Court of Michigan, in an opinion delivered by Judge Campbell of that court, held that the proceedings of the plaintiffs having been manifestly taken with the view to depriving the defendant of his legal right to have the cause removed to the United States Court, were a fraud upon him. In the opinion of the court Judge Campbell says: "The act of Congress allowing a defendant who is a citizen of one state, sued in a court of

a state of which he is not a citizen, by those who are citizens of the latter state, to file a petition of removal when he enters his appearance, such removal when applied for in due form and at that time, is a matter of right: Brightley's Dig., 129. But the statute will not allow this application to be postponed until other steps are taken in the cause by the applicant. Neither can the cause be removed if there are other material defendants who are citizens in the same state with plaintiff; inasmuch as the jurisdiction arises under the United States Constitution which restricts this class of cases in that respect. It will be apparent therefore that the effect of the proceedings in the case before us, upon the hypothesis set up in the defendant's adavits, was, by joining Emerson as a defendant to oust Yawkey of his right to remove the cause to the United States Court; when, by the discontinuance, a case is left which, but for the device, he would have been entitled of right to have transferred. * * * *The object was manifestly to defeat his opportunity of removing the cause and was a gross fraud perpetrated to deprive him of a legal right. If such crooked devices can be practiced in courts of law with impunity, the administration of justice will incur odium and distrust, and will deserve them."*

In addition to these authorities we call attention of the court especially to the opinion in this litigation by the United States Circuit Court of Appeals of this circuit in the replevin action, which opinion has been published in the official reports.

See *Boatmens Bank* v. *Fritzlen*, 135 Fed. Rep., 650;

See also *Boatmens Bank* v. *Fritzlen*, 68 C. C. A., 288.

That opinion certainly sustains to the fullest extent the right of removal in this case on the second removal

petition and bond of the bank. That decision, as we have seen, was given in the replevin action in the United States Court. The lower Federal Court dismissed the replevin action, on the ground that that replevin action created a case of conflict with this action. That dismissal proceeded upon the theory that this action was not removed on the first petition, notwithstanding the decision of Judge Lochren holding that it had been removed, and the United States Circuit Court of Appeals was called upon in the hearing of the replevin action in that court to decide whether this action was pending in the United States Circuit Court when the replevin action was instituted. The dismissal of the replevin action, as already stated, proceeded upon the theory that notwithstanding Judge Lochren's decision, this cause had not been removed to the United States Court because it was not a removable case, and that therefore, notwithstanding Judge Lochren's decision in September, 1903, entertaining jurisdiction, this case was still pending in the state court when, in October, 1903, the replevin action was brought. The United States Circuit Court of Appeals was therefore directly confronted with the question in the replevin action on the writ of error therein whether this suit, as Judge Lochren had decided, was removed to the federal court on the first removal petition, and the United States Circuit Court of Appeals proceeded to decide and did decide, as by reference to its opinion will be seen, that this cause was removed, as Judge Lochren had decided, on the first removal petition and bond and was pending in the United States Circuit Court when the replevin action was brought and that therefore there was no conflict of jurisdiction.

We repeat, that that decision of the United States Circuit Court of Appeals is decisive of the question of the right of the bank to remove this case on the second pe-

tition and bond filed June 10, 1904, for if, as the Circuit Court of Appeals decided, the bank was entitled to remove the case on the first petition, most certainly it was entitled to remove it on the second petition, and upon the showing in that petition, especially in view of the answer of Fritzlen and Weldon's reply filed after the remanding of the case and entirely changing its character.

In this connection, it may be argued that if the case was removable by the bank on the first petition and bond, it was not removable on the second petition and bond. This does not at all follow. It is removable on both petitions and bonds and on each of them. It was removable on the first petition and bond, as the United States Circuit Court of Appeals decided on the record as it then stood, and it was removable on the second petition and bond on the record as it then stood, on the answer of Fritzlen and plaintiff's reply, filed after the cause was remanded.

The opinion of the United States Circuit Court of Appeals is not only a demonstration but an explicit adjudication that the order and opinion remanding the case were erroneous and illegal, but Fritzlen, who obtained that order of remand, cannot profit by the fact procured and caused by him that it was erroneous and illegal, and if, as we have seen, this case is removable on the second petition and bond based on the changed condition of the record by the filing of plaintiff's reply and Fritzlen's answer, then the fact that it became so removable on that second petition and bond cannot be modified or taken away by the consideration that the previous order remanding the case was erroneously and illegally procured by Fritzlen.

In view of the authorities cited above, it must be conceded that the second petition and bond removing the case should have been granted, if upon the filing of

Fritzlen's answer and plaintiff's reply it became a removable case by the changing of the record so as to show a controversy or controversies between citizens of different states, and it must be conceded that this case was removable on the second petition and bond if it became removable on the filing of plaintiff's reply and Fritzlen's answer, although the previous order of remand was not legal or proper. This being so it is not possible to prevent the removal on the second petition and bond upon the consideration that the remanding order obtained and procured by Fritzlen was erroneous and illegal. If in a case where a suit is properly remanded on the first removal petition and bond the suit may thereafter be removed on a second petition where it is so changed as to show a removable controversy, then a removal on a second petition and bond in case of such change, could not be denied if the order remanding the case on the first petition was improperly obtained. Otherwise a party obtaining the erroneous and illegal remanding of a case would be enabled to profit by his own wrong and his own error. Parties in courts are never permitted to profit by their own wrongdoing or their own errors or illegal acts. The fact, therefore, that Fritzlen and his attorneys obtained, as the Circuit Court of Appeals has expressly and most emphatically decided, the order remanding this cause improperly, illegally and erroneously, cannot now avail to prevent the removing the case on the second petition if on the changed record the case is removable. As we have seen, the bank was entitled to a removal on its second petition, as the record on Fritzlen's answer and Weldon's reply then stood.

In this connection, we again suggest to the court that, for some reason, the answer of Fritzlen which was filed May 26, 1904, was not filed while this case was in the United States Circuit Court and before it was remanded. If Fritzlen, from the time this suit was brought in July, 1903, to May 26, 1904, when he filed his answer,

had failed or neglected to file his answer without the consent of Weldon, then during all that ten months which intervened before he filed his answer, he, Fritzlen, was in default and was liable to a judgment being entered in Weldon's favor at any time. If the delay in filing the answer by Fritzlen was the result of an understanding with Weldon or Weldon's attorney, there must have been some reason for that understanding. It is very unusual, especially in suits of importance like this, if they are conducted in good faith, for a defendant not to file his answer until ten months or more after the bringing of the suit and process is served upon him. Fritzlen was served with process in this case in July, 1903. (p. 19, Rec.) Why did he withhold the filing of his answer until May 26, 1904? Why was that answer withheld and not filed all the time the case was pending in the United States Court and not until after it had been remanded and was then filed in the state court. If the purpose of withholding that answer by Fritzlen until after the remanding of the suit was to prevent its being made to appear while this case was in the United States Court that it was a case involving controversies between citizens of different states and for the purpose of enabling him to procure a wrongful and erroneous order remanding the case, then when that answer was filed Fritzlen becamed estopped by his wrongful and fraudulent conduct to prevent a removal on a second petition filed after the actual filing in the state court of that answer. Of course, the bank had no right to anticipate what Fritzlen's answer would contain until it was actually filed. The bank had no right to anticipate that Fritzlen in his answer would convert the case into a new suit between Fritzlen as plaintiff and the bank as defendant. The bank had no right to anticipate that his answer would contain two causes of action, one for a breach of contract for $20,000 and the other an action for trover and conversion for $25,000. Therefore, the

bank had the right, on the plainest principles of law and justice, to remove this case when said answer of Fritzlen was filed, by filing a new removal petition and bond, and Fritzlen could not prevent such removal on a second petition and bond, by previously and fraudulently withholding the filing of his answer until after the case had been remanded on the first petition and by wrongfully, erroneously, fraudulently and illegally obtaining an order to remand the case.

The cases where this court has refused removals and has not sustained removals where they were taken by a single defendant who resided in another state, were generally law actions. In law actions, as is well known by every lawyer and judge, each one of the plaintiffs is presumed to be a party in interest in the recovery of the money or property sued for, and each defendant in that class of cases is interested in defending against the recovery from him of the money or property sued for. Law actions are always inflexibly for the recovery of either money or property, and in law actions there is no flexibility which authorizes any relief as in equity cases except a money judgment for the plaintiff, or a judgment in behalf of the defendant.

These observations are true both of law actions *ex contractu* and law actions *ex delicto,* and where there is more than one plaintiff, the plaintiffs are all jointly interested in the recovery of the money sued for, and the defendants are jointly interested in the defeat of the suit for the money. Hence this court has uniformly ruled in that class of cases that there is no such thing as a separable controversy in favor of a single defendant who happens to reside in another state, and this court has also held that the doctrine of rearrnging the parties with reference to their real relation to the controversy, has no application to that class of cases, for the reason that in law

actions the plaintiffs are parties who are all interested in the recovery of the money sued for and the defendants are interested in the defeat of the money action; but in equity cases this court has recognized all along that there may be several controversies in the case, and that a court of equity in finally and completely administering justice in favor of all the parties may adjust its decree so as to adjust and settle the several equities of the several parties in the case.

In this connection, it is a well known fact that in equity cases it often happens that parties are joined as defendants who are really interested with the plaintiff, or plaintiffs, which is never done in law actions; and therefore in equity cases it cannot always be affirmed that a party who is joined as a defendant is interested in the same way in the controversy that the other defendants are interested. In equity cases, courts often entertain cross bills or cross petitions, with a view of adjusting and adjudicating all the rights and equities of all the parties, and, as we have already seen, some of the defendants in equity cases may be interested with some of the plaintiffs, and some of the plaintiffs may be interested with some of the defendants. Therefore in this class of cases in courts of equity this court laid down the reasonable rule that the court must look beyond the mere style of the case as to who are plaintiffs and who are defendants and look into the record and determine the relations of the parties, irrespective of their arrangement by counsel, as plaintiffs or defendants in the controversy in the case, for the purpose of determining whether the suit is a controversy between citizens of different states. The removal Acts of Congress of 1886 and 1887, while in other respects limiting the jurisdiction of federal courts given by the Act of 1875, contain the same provisions as the former judiciary acts in conferring jurisdiction, both original and on removal, over "controversies beteen citizens of different states."

This Court has frequently ruled that in determining the question of jurisdiction on removal, in equity cases like this, it is the duty of the Federal Trial Court to rearrange the parties and determine their real relations to the controversy, and some of those dicisions were rendered under the Act of 1875, and some since and under the acts of 1886 and 1887. As we have seen, the general clause granting jurisdiction over "controversies between citizens of different states," in suits originally brought or suits removed, is the same in the Acts of 1886 and 1887 as in the Act of 1875, and this rule in regard to the rearrangement of the parties in this class of cases is therefore the same under the Acts of 1886 and 1887 as under the Act of 1875. An examination of the decisions of this court will show that the cases in which this court has recognized, for the purpose of solving this question of jurisdiction, the duty of the court to rearrange the parties, were generally if not always equity cases. Some of those cases are cited by Judge Sanborn in the opinion in this case of the United States Circuit Court of Appeals. See page 296, Vol. 68 C. C. A. They are also cited by the Supreme Court of Kansas.

We have, therefore, two classes of cases which have been decided by this court. One branch of law actions which have received its consideration on this removal question, consisted of cases brought for personal injuries against railroad companies where the employees of the companies were joined with the companies, the employees generally being citizens of the same state with the plaintiffs and the railway company being a citizen of another state. This court has uniformly held in that class of cases, that the liability sued for being joint, there was no separable controversy and no condition as in equity cases authorizing the court to rearrange the parties, and that the relations of the parties to the controversy were inflexibly fixed as made by the petition in the law action.

Another branch of law cases where this court has refused the removal, was where an action is brought on a contract and where there was more than one defendant. This court has held in this class of cases, that the liability of the defendants sued in the action being joint, there was no separable controversy authorizing the removel by one defendant who is a non-resident of the state, and that the parties could not be rearranged.

A case of the latter kind recently decided by this court, is that of *Cochran* v. *Montgomery County*, 199 U. S., 260. In that case the action was brought in the state court of Alabama, by Montgomery County, Alabama, a corporation and therefore a citizen of that state, against John J. Cochran, a citizen of Alabama and also against the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, as defendants. The action was upon the bond which Cochran had given to the County as Treasurer and which had been signed by the deposit company as surety. The surety company sought to sustain a removal of the cause to the Federal Court and the cause was removed and jurisdiction entertained by the United States Circuit Court of Alabama where judgment was given. That judgment was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit. Thereupon a *certiorari* was sued out to this court and this court granted the writ of *certiorari,* considered the case and reversed the judgment of the Circuit Court of Appeals for the Fifth Circuit, this court holding that that case was not properly removed from the State Court of Alabama to the United States Circuit Court.

In the case at bar, Fritzlen, after the decision against him of the United States Circuit Court of Appeals, sued out a *certiorari* to this court. This court, however, denied the writ of *cetiorari* thus sued out by Fritzlen, and there-

by affirmed the decision in this case by the United Staes Circuit Court of Appeals, which held that this suit was and is a removable case. The decision of this court in this case affirming the removal in this case, may be found at pages 586-587, Vol. 198 U. S. Rep. It is thus seen that the decision of this court affirming the removal of this cause and the decision of this court in denying the removal in the case of *Cochran* v. *Montgomery County,* are reported in the two volumes of 198 and 199 U. S. The decision of this court affirming the removal of this case was rendered May 28, 1905. The decision of the same court in the case of *Cochran* v. *Montgomery County* was given November 27, 1905.

In this connection, we beg leave to call the attention of the court to the fact that by Sec. 5 of the Juriciary Act of March 3, 1891, by which the United States Circuit Courts of Appeals were created, jurisdiction is conferred on the Supreme Court of the United States to determine all cases of questions of jurisdiction under the Constitution and laws of the United Staes, of the United States Circuit Courts, by the writ of *certiorari* and also by a certificate and by the remedy of appeal and thus the Supreme Court of the United States is given the power to finally determine questions of the Circuit Courts' jurisdiction under the Constitution and laws of the United States. In this way, in the case of *Cochran* v. *Montgomery County,* this court, notwithstanding the decision of the United States Çircuit Court of Appeals for the Fifth Circuit, considered it its duty to grant the *certiorari,* to hear the case and to reverse the decision of the Circuit Court of Appeals on the question of jurisdiction of the Circuit Cout of Alabama.

Acting upon the same idea, it must be assumed that if this court, on the application in this case of Fritzlen for a *certiorari,* had considered the decision of the

United States Circuit Court of Appeals for the Eight Circuit in this case wrong or erroneous, it would have granted the *certiorari* prayed for and it would have heard the case and reversed the decision in this case. But this court in the two cases clearly distinguished between law actions *ex delicto* and *ex contractu*, and equity causes and its holding in law cases against the removal, and its decision in cases of equity, like the suit at bar, where there are different controversies, some of them separable, and some of them controversies in which the parties on one side are citizens of one state and the parties on the other side citizens of other states, illustrate the rules applicable to the two classes of cases. The error of the decision of the learned judge who remanded this case of *Weldon* v. *Fritzen*, 128 Fed., 608, consists in the proposition maintained by him that this was a simple suit of foreclosure on the part of Weldon against Fritzlen involving only that controversy and that there was no separable controversy in the case with the bank. His decision is in direct conflict with the decision of the Kansas Supreme Court in the case of *Bradley* v. *Parkhurst*, 20 Kas., 462.

In that case it was held by the court that a junior mortgagee in a suit forclosing his mortgage, could make a senior mortgagee a party and litigate the validity of the senior mortgagee's mortgage in that suit. The court held in that case, that this might be done under the Kansas Code. Many authorities bearing on the question of parties in such actions were reviewed by the court in its opinion in that case.

However, the court in its opinion in that case held that the joining in such cases of the suit for foreclosure by the junior mortgagee with such a cause of action against a senior mortgagee, challenging the latter's mortgage, was the uniting of two causes of action, which at

the option of the plaintiff might be made the subject of two separate suits, or united in one action, but at page 470 in the opinion in that case, the court said:

> *"As the uniting of such causes of action is a matter of choice, and not of necessity, the mortgagee cannot, by uniting, deprive either defendant of any right he would be entitled to in case the two actions were separately brought.* This last remark is applicable to the objection, that if the holder of the adverse title be in possession the action is tantamount to an action for the recovery of the possession, in which the statute gives the defendant a right to two trials."

Applying the adjudication thus made by the court in that case to the case at bar, it results that while Weldon, in bringing this action, if it had been brought in good faith and not fraudulently, as an action really not in his own behalf, had the right to join the bank as a defendant and attack the validity of its mortgage, yet the rights of the bank under the above ruling were and are the same as if Weldon and Fritzlen had brought a separate action against the bank to obtain a decree adjudging its mortgage to be invalid, and one of the rights confessedly of the bank in that case would be to remove the case to the United States Court. And if in a suit separately brought to cancel the bank's mortgage the right of removal exists, then according to the doctrine of the court in *Bradley* v. *Parkhurst,* the right exists in this case.

As we have already seen, the Kansas Supreme Court, while sustaining all the ground set forth in this brief and argument in favor of the removal, more especially placed its decision upholding the removal on the ground that by Fritzlen's answer he became the real plaintiff in the case against the bank. This is undoubtedly true as to the two common law actions for damages in the two last counts against the bank in Fritzlen's answer. But the removal

as to the cause of action charging the bank's mortgages to be invalid was also proper on the second petition, because of the fact that Fritzlen was permitted to withhold his answer until after the case was remanded from the Federal Court on the first petition. In other words, the removal on the second petition was proper on this ground because of the concealment by both Weldon and Fritzlen of their grounds of attack on the bank's mortgages until after the remand was made and accomplished.

It seems to us that the proposition is undeniable that if parties to a suit bring into it a controversy which is removable, but if the nature and character of the controversy is purposely concealed until after the remand for the purpose of not disclosing the nature of the controversy as a removable one, then the party entitled to the removal may apply on a second petition when the grounds of the controversy become fully disclosed, the same as he could have applied if the character of the controversy had been revealed in the first instance on the bringing of the suit.

This principle has been illustrated by some of the decisions. One of those decisions is the case of *Dudley* v. *Illinois Central R. R. Co.*, 96 S. W. Rep. 835, which was decided by the Court of Appeals of Kentucky in October, 1906. That was an action for personal injuries by the plaintiff and was brought by a Kentucky citizen in a Kentucky state court against the Railway Company, a citizen of Illinois, and an employee of the company, who was also a resident and citizen of Kentucky was joined as a defendant. There were two applications for removal in the case by the Railway Company. The petition for the first removal was filed upon the appearance of the Railway Company, but the court held that the petition stated a good cause of action against both defendants and that the trial court properly denied the first removal pe-

tition. Subsequently there was a trial of the case and at the close of plaintiff's evidence it seems that the resident defendant was dismissed as being a party against whom there never had been a cause of action. And thereupon the Railway Company filed a second application for removal in the case, which was granted. The plaintiff appealed. The Court of Appeals, while holding that the first petition was properly denied, held that the second was properly granted. The proposition decided as appears from the third point in the syllabi of the case, is as follows:

> "Where, in an action for injuries to a servant, plaintiff joined a resident employee as a party defendant with the railroad company, which was a non-resident, and at the close of plaintiff's evidence no cause of action had been established against the resident defendant, and there was nothing to warrant the presumption that a stronger case could have been made out when the petition was filed, it was proper for the court to grant the railway company's renewed motion for a removal of the cause to the federal court, on the ground that the citizen defendant had been joined for the sole purpose of preventing such removal."

The Court in its opinion in that case used the following language:

> "The petition stated a good cause of action against both of the defendants, and the court properly refused to transfer the action when the motion was first made. *I. C. R. R.* v. *Colway*, 89, S. W., 234; 28 Ky. Law Rep., 336; 1 L. R. A. (N. S.) 370; *Pierce's Adm's* v. *I. C. R. R.*, 86 S. W., 703; 27 Ky. Law Rep., 801. Whether the transfer was proper, upon the conclusion of the evidence for appellant, depends upon the question whether or not Mitchell was joined as defendant in good faith. The mere fact that the trial judge sustained a peremptory instruction on behalf of Mitchell is entitled to some

weight, but is not in itself conclusive evidence that Mitchell was not joined in good faith, or that appellant failed to make out a case against Mitchell. To determine, therefore, whether or not the action was proper, we will examine the evidence introduced by appellant and determine from it whether or not the averments of the petition stating a good cause of action against Mitchell were sustained. The substance of the allegations against Mitchell are that he was directly in charge of and control of and actually managed and controlled the tank, crane, spout, pumping station, and all appliances connected therewith, and that as agent and servant of the company he carelessly and negligently placed the pillars, supporting the spout and crane, dangerously and unnecessarily near the track, making the same improper, defective and dangerous because of its proximity to the track; and that the company and Mitchell negligently permitted the chains, spouts and other appliances of the tank to be defective and out of repair, and to hang in dangerous proximity to the top of the cars. The evidence for plaintiff was to the effect that Mitchell was in charge of the tank and pump of the defendant on the Evansville and Hopkinsville Division, which included the tank at Cerulean Springs, and hired the pumpers, and that the tank at Cerulean Springs was some two feet nearer the track than the tank at Princeton on the same line; that Mitchell was working under one Noles, and had been repairing the tanks and machinery attached thereto; that the water pipe from the tank was the instrument that struck the appellant and knocked him off the train; that it was Mitchell's duty to examine the tanks and pumps at each station, and keep them in running order; and that the pipe that struck appellant was improperly adjusted and hanging too far over the tracks. There was no evidence whatever tending to show that Mitchell had anything to do with erecting the tank or placing or adjusting any of the fixtures or appliances thereon; nor does the evidence disclose whether the pipe that struck appellant was so constructed that it

hung too far over the track, or was negligently permitted to hang in that condition by some persons when using it; nor does the evidence show that Mitchell could have reconstructed the tank or placed it further from the track, or have supplied it with different pipes or appliances, or that he was furnished by the master with any other appliances than those in use, or that he had it in his power to do anything more than he had done. Mitchell was a subordinate employee of the railroad company, work-under the superintendent or person who had charge of the tanks and pumping stations.

"Assuming that it was the duty of Mitchell to keep these tanks and appliances in repair, and that the water pipe that struck appellant was hanging too low down, Mitchell could not be held liable to appellant, unless a servant such as Mitchell was is liable for nonfeasance, or for his failure to affirmatively take some action to remedy defects or dangerous appliances to which his attention may be directed. This precise question was before this court in Cincinnatti, *New Orleans & Texas Pacific R. Co.* v. *Robinson*, 74 S. W., 1061, 25 Ky. Law Rep., 265, and it was there held that the petition having failed to show any cause of action against Robinson, the employee joined with the company, that it was proper to remove the case to the United States Circuit Court. In the case at bar the evidence wholly fails to make out a case against Mitchell, and therefore the action of the trial judge in giving the peremptory instruction was proper. The petition for removal set out that Mitchell was joined as a defendant for the sole purpose, and with the fradulent design, of preventing the transfer of the case to the United States Circuit Court, and that the allegations of the petition in respect to Mitchell were untrue, and could not be sustained by evidence; and, when the evidence on behalf of appellant disclosed a total failure to show any liability on the part of Mitchell, the conclusion remained that the allegations of the petition for removal were true.

"The *Illinois Central R. Co.* v. *Coley*, 89 S. W.

234, 28 Ky. Law Rep., 336, 1 L. R. A. (N. S.), 370, the engineer in charge of the train that injured plaintiff was joined as a defendant. A petition similar to the one in the case at bar was filed for removal, and overruled. On a trial, a verdict was rendered against the defendants In discussing the question of removal, this court said: 'If the engineer negligently ran the engine against the wagon in which appellee was riding and injured her, he is liable to her for her injuries. The fact that he did not own the engine, or that he was operating it in the service of the railroad company, makes him none the less liable for his personal wrong. If, in operating the engine, he was acting as agent of the railroad company, and his act was its act, then it it is also responsible to her upon the principle that he who does an act by another does it himself.' In that case the evidence justified the finding that the engineer was guilty of an affirmative act of negligence, and, although a subordinate employee, was jointly liable to his principal for his negligent conduct. The court further said: 'If the plaintiff trifled with the court, and joined a defendant who is a resident of the state simply for the purpose of defeating the right of the other defendant to remove the case to the federal court, the court should, as soon as this is made apparent on the trial, dismiss the action as to the defendant fraudulently joined, with costs, and remove the case to the federal court. The court should not at any stage of the proceeding allow a party to trifle with its process, or to defeat the courts by fraudulent joinder of a person as a defendant.'

"If the plaintiff can by stating in his petition a good cause of action against a resident defendant, thereby prevent the non-resident from transferring the case although upon the trial the evidence wholly fails to show any causes of action against the resident defendant, the result would necessarily be that in every case where this was done a removal could be prevented, and the plaintiff, by the fraudulent or mistaken joinder of a person as a defendant, could

defeat the jurisdiction of the federal court. *Powers* v. *C. & O. Ry. Co.,* 169 U. S., 92, 18 Sup. Ct. 264, 42 L. Ed., 673. It is true that it is for the state court to determine from the record, when the motion for a transfer is made, whether or not there is then presented a state of case authorizing a transfer. *Illinois Central R. Co.* v. *Jones' Adm'r.,* 80 S. W., 484, 26 Ky. Law Rep., 31; *Rutherford* v. *Illinois Central R. Co.,* 85 S. W. 199, 27 Ky. Law Rep. 397. And it has been ruled in a number of cases that the motive or purpose of the plaintiff in joining the defendants will not be inquired into, provided a cause of action is stated against them jointly. *Winston's Adm'r* v. *Illinois Central R. Co.,* 23 Ky. Law Rep., 1283; 65 S. W., 13; 55 L. R. A., 603; *C. & O. Ry. Co.* v. *Dixon,* 179 U. S., 131; 21 Sup. Ct., 67; 45 L. Ed., 121; *Rutherford* v. *Illinois Central R. C.,* 85 S. W., 199; 27 Ky. Law Rep., 397. But when, during the progress of the trial—for instance, at the close of the plaintiff's evidence—it becomes apparent that no cause of action has been made out against the resident defendant, and there is nothing in he record to warrant the presumption or conclusion that a stronger case could have been made out when the petition was filed, the court will not sit idly by and permit a plaintiff, by making allegations that he must have known that he could not establish, to deprive the defendant of a right guaranteed to it or him by law. However reluctant state courts may be to surrender their jurisdiction, they cannot lend themselves to a scheme to defeat the rights to which each of the parties litigant is entitled, or permit a skillful pleader to determine the question of removal without reference to the merits of the case."

It is thus seen that the principle decided in that case was that, although there was not any change made in the cause after the remand making it in itself a removable case, the removal on the second petition was, nevertheless, sustained, for the reason that the plaintiff concealed by the manner in which he framed his suit, the fact

that the case was a controversy solely between citizens of different states and that the fact that the plaintiff concealed the want of a cause of action as against the resident defendant until the trial, warranted the removal on the second petition on the ground of concealment and estoppel. If that rule was correct as applied to a law action, how much more must it be true as applied to an equity suit like the case at bar, where it is much more easy than in a law action to conceal the nature and character of the real controversies in the case for the purpose of preventing a removal.

The same ruling was made by the same court in the case of *Underwood* v. *Illinois Central R. R Co.,* 103 S. W., 322, decided in June, 1907. This case seems to have been before the Kentucky Court of Appeals twice. On the first appeal it was held that the case was not removable by the railway company, which removal had been taken on the appearance of the company and was based upon the case as it then stood on the pleadings. Afterwards, however, there was a trial and it appeared that the company's employee had been joined as a defendant to prevent a removal. On the second appeal, the Court of Appeals sustained the removal of the case on the second petition.

In the opinion of the Court of Appeals in this case on the second appeal the court, sustaining the second removal, used the following language:

> "It is manifest that the court properly gave the peremptory instruction as to the resident defendant. There was nothing in the evidence to show any liability on his part, or to show any ground for the plaintiff's believing him liable, or to warrant the presumption that a stronger case could have been made out when the petition was filed, or that the plaintiff had any ground to so believe. The right to transfer a case to the Circuit Court of the United States cannot be permitted to be defeated by a mere form

> of allegation, and when it is apparent that the resident defendant was joined only to prevent the removal of the case to the United States Circuit Court, and without any reasonable ground on the part of the plaintiff to expect a recovery against him, the Court should, as soon as this appears, dismiss the action as to the defendant thus joined and remove the case to the federal court."

This decision is also based on the proposition that, although the real nature of the controversy makes it a removable one from the time of the bringing of the suit, still if plaintiff, by concealment and suppression of the true facts, renders it impossible to be disclosed until after the remand on the first petition, that the case is removable and that fact is then made to appear, the second removal is proper on the ground of fraud, concealment and estoppel.

The same principle was adjudged by the same court in the case of *Klinger* v. *Chesepeake & O. R. R. Co.*, 109 S. W., 315, which was decided in April, 1908. In that case it was adjudged that:

> "Where an action is brought against a foreign corporation and a resident citizen, and it appears from the evidence on the trial that plaintiff had no reasonable ground to believe that the resident was in any manner liable, the court should give a peremptory instruction in behalf of the resident defendant, and order the case removed to the federal court on application of the defendant corporation."

II.

Upon the point that the motion of defendant in error to dismiss the writ of error in this case for want of jurisdiction, should be sustained, we again call the attention of the court to what is said in our motion to dismiss, from p. 1 to p. 10. The only point suggested in

opposition to that motion seems to be that the Kansas Supreme Court, in holding this to be a removable case on the second removal petition does not give effect to the order of the Circuit Court of the United States remanding this case on the first petition. The answer to that, however, is that full effect was given to the order of remand by redocketing the case in the state court, when the case went back to the Clark County District Court. It was there redocketed and proceeded in as if there never had been a removal on the first petition followed by a remand. The logical result of the proposition of counsel for plaintiffs in error is that where there is a remand of a cause to a state court on the first removal petition, no removal can take place after such remand and redocketing of the case on a second removal petition based upon a new showing and change in the case. If the second removal petition in this case made out a case for removal on a changed condition of the record made after the remand, then it cannot be said that the court, by sustaining the removal on the second petition, did not give effect to the remand. The remand was given full effect when the case was redocketed in the state court.

This court has more than once sustained a removal on a second removal petition. The case of *Powers* v. *R. R. Co.*, 169 U. S., 92, is the leading case decided by this court. The cases cited in this brief show that the decisions are numerous which sustain removals on second removal petitions filed after the remand of the case, and, as will appear from the records of those cases, it was never suggested in any of those decisions, either by this court or in those given by the Circuit Courts of Appeal, that where the second removal petition was sustained any violence was done to the previous order of remand. It was never supposed in any of those cases that the court in granting the second removal petition did an act in

violation of the order of remand, which, as we have seen, was fully executed before the second removal petition was filed by redocketing the case in the state court.

In this case the contention of the plaintiff in error was against the right of removal claimed by the bank. Plaintiffs in error did not claim any right under the laws or Constitution of the United States. The attitude of the plaintiffs in error was negative in opposition solely to the federal right of removal claimed by the bank.

In the brief of plaintiffs in error in opposition to the motion to dismiss the writ of error for want of jurisdiction and at page 8 of said brief, plaintiff in error cited the case of *McCormack* v. *Bank*, 165 U. S., 538. In that case, each of the parties claimed under separate and distinct provisions of laws of the United States respecting national banks. And this court there overruling the motion to dismiss, based its ruling upon the ground that the defeated party in the State Supreme Court affirmatively pleaded and invoked an act of Congress, and that the denial of that affirmative plea under a distinct and separate provision of the act of Congress authorized this court to take jurisdiction because of that denial, but that is not the case at bar.

In both the trial and Supreme Courts of the State in this case, these plaintiffs in error have made no claim affirmatively under an act of Congress. The only claim made by plaintiffs in error upon this question of removal by the bank has been negative in its character. The attitude of plaintiffs in error has simply been one of denial of the federal claim of removal made by the bank in all of the courts in which this case has received consideration. The bank has made an affirmative claim of the right of removal under the laws of Congress. Plaintiffs in error have simply denied the existance of that federal claim or right of removal.

If this court on this writ of error can take jurisdiction in this case, then like jurisdiction may be taken in all cases that come up to this court from state supreme courts where a federal question is decided, whether that decision is either for or against the federal claim. We argued in our motion to dismiss, which is now submitted herewith, that it evidently was the policy of the Congressional Judiciary Acts from 1789 until now, to restrict the appellate jurisdiction of this court from state supreme courts to cases where the decisions were against and not in favor of the federal right or privilege claimed.

Under Article 6 of the United States Constitution, state Supreme Court judges are sworn upon being inducted into office, to uphold and maintain the Constitution and laws of the United States. In passing upon cases involving federal questions, as was done by the Kansas Supreme Court in this case, the Judges of that court are a part of the federal judiciary, as much so as if they were judges of this court. Therefore the decision of the Kansas Supreme Court in this case upholding the right of removal on the part of the bank is the same as if it had been given by this court.

What we say from page 7 to 9 of our motion to dismiss, seems to us to present an unanswerable view on this point. The federal question in this case is whether the bank was entitled to the removal of this case to a federal court. That was the federal right or claim made by the bank.

The plaintiffs in error have never claimed, as we have seen, any right either upon the point of jurisdiction or upon the merits in this case under the Constitution and Laws of the United States. The claim of the plaintiffs in error has been and is that the bank is not entitled to its right or privilege of removal claimed by it under the Constitution and laws of the United States. That

right and privilege, however, was sustained by the Kansas Supreme Court, and we submit that its decision affirming and sustaining that right is as final as if it had been given by this court, and is not subject to review by this court on this writ of error.

In the case of *R. R. Co.* v. *Morgan*, 160 U. S., 288, this court affirmed the proposition that where a plaintiff in error in this court contended negatively against the federal right claimed by the other party, a writ of error would not lie to this court. That was an action against a railroad company for ejecting the plaintiff from a car. The defense was that a silver coin offered by the plaintiff in payment of his fare was not legal tender because of being worn by abrasion. The plaintiff had judgment in the court below. The railroad company appealed, but this court held that the railroad company, while denying the plaintiff's claim, set up no right under any statute of the United States in reference to the effect of the reduction in weight of silver coin by natural abrasion. And the writ of error of the railway company was dismissed.

In its opinion in that case, delivered by the Chief Justice, it is said:

> "By Sec. 709 of the Revised Statutes, a final judgment or decree in a suit in the highest court of a state in which a decision could be had, may be re-examined and reversed or affirmed by this court upon a writ of error where, among other things, 'any title, right, privilege of immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority.' Neither in defendant's pleadings, nor in the motion to direct the jury to find for defendant, nor in the objection

and exception to the instructions, was any such right specially set up or claimed. The claim which defendant now states it relied on is that the coin in question was not legal tender under the laws of the United States. This, however, is only a denial of the claim by plaintiff that the coin was such, and as, upon the facts determined by the verdict, the state courts so adjudged, the decision was in favor of and not against the right thus claimed under the laws of the United States, if such a right could be treated as involved on this record, and this court has no jurisdiction to review it."

This decision was followed by this court in the case of *Conde* v. *York,* 168 U. S., 642, l. c., 650.

III.

The brief and argument of the plaintiffs in error perhaps call for some consideration, which we will give at this point.

The cover and the first page of the brief and argument for plaintiffs in error show that Weldon, the plaintiff in this case, and defendants, Fritzlens, join in the brief and argument as well as joining in the writ of error and asignment of errors.

It will thus be seen that in this Court, as well as in all the other courts in which this litigation has been pending, the Fritzlens and Weldon array themselves on one side and always against the bank on the other side.

The writ of error herein was sued out by the Fritzlens and Weldon as plaintiffs in error, jointly (p. 103, Rec.).

The citation herein against the bank was sued out by Fritzlens and Weldon jointly. (p. 104, Rec.).

The bond on the writ of error herein was executed by the Fritzlens and Weldon jointly, as principals. (p. 102, Rec.).

At the time of suing out the writ of error and citation herein, Fritzlens and Weldon filed their joint assignment of errors. (pp. 95-101, Rec.).

In the Kansas Supreme Court the Fritzlens and Weldon filed cross-petitions in error, in response to the bank's petition in error. The bank's petition in error in the Kansas Supreme Court may be found from p. 1 to p. 8 of the record.

The cross-petitions in error of Weldon and Fritzlens may be found from pages 9 to 11 of the record.

The brief and argument of plaintiffs in error in this court, are, as already indicated, jointly made by Fritzlens and Weldon, and the names of the attorneys of Fritzlens and Weldon appear on the cover of the brief and argument of the plaintiffs in error in this court, Messrs. Bone & Hite being the attorneys of Fritzlens, and Mr. Price the attorney of Weldon.

In the brief and argument of plaintiffs in error, much is said in support of the proposition that the answer of Fritzlens was merely responsive to the bank's answer. Indeed, nearly all of the argument and suggestions of the attorneys of Weldon and the Fritzlens in their joint brief are made in support of the contention that Fritzlens' answer is to be taken and considered in the case as merely responsive to the bank's answer. The answer of the bank is at p. 34 of the record, and is purely negative in its character. It first contains a general denial of every allegation in Weldon's petition. It then sets out and gives the dates of the bank's mortgages referred to in plaintiff's petition, and shows that the bank's mortgages were prior and therefore paramount to the mortgages of Weldon, and, having thus given the dates of the bank's mortgages, it concluded with a prayer for judgment in favor of the defendant on the issues tendered by Weldon's petition, and concluded in the usual form, that the bank "may go

hence without day with its costs laid out and expended." The answer is a pure negative plea to Weldon's petition and was so properly held by the Kansas Supreme Court in its opinion. Thus, at p. 94 of the record, the Supreme Court of Kansas, in its opinion, said: "On May 14, 1904, the bank filed an answer which, in effect, denied the allegations of Weldon's petition, but asked for no affirmative relief." The answer of Fritzlen extends from p. 47 to p. 52 of the record. Fritzlen's answer occupies six pages of the printed record herein. Only ten lines in the opening paragraph of Fritzlen's answer are devoted to a confession of Weldon's debt and mortgage. All the residue of Fritzlen's answer sets up the cause of action of Fritzlen against the bank. That part of his answer commences as follows: "This defendant for his cause of action against his co-defendant, the Boatmens Bank, says," And then in the four counts thereafter, Fritzlen sets out his causes of action against the bank.

In Fritzlen's answer, it will be observed, there is no denial, or confession, or avoidance of any of the matters pleaded by the bank in its negative answer to Weldon's petition. The answer of Fritzlen does not in any of its parts purport to be a plea or answer in response to the negative answer of the bank to Weldon's petition. Leaving out the first ten lines of Fritzlen's answer wherein he confesses Weldon's note and mortgages, the residue of Fritzlen's answer is the same as if it were a petition in suit by Friztlen against the bank. Fritzlen himself treated his answer as a petition against the bank. His answer was filed May 26, 1904. On June 18, 1904, after the trial state court overruled the bank's second removal petition, Fritzlen filed a motion for judgment by default against the defendant bank, because the bank had not filed an answer in the case to the causes of action pleaded by Fritzlen in his answer.

The trial state court overruled the motion of Fritzlens for judgment by default against the bank, as appears by the order of the state district court recited at p. 65 of the record herein, and after the district court overruled the motion of Fritzlens for judgment by default against the bank for want of an answer to the cause of action pleaded by Fritzlen in his answer, the bank filed a demurrer to Fritzlen's answer and also a demurrer to plaintiff's reply at the same time. That part of the order of the state district court overruling Fritzlen's motion for judgment by default and allowing the bank to file demurrers is in words and figures as follows:

> "Whereupon the defendants D. G. Fritzlen and Edna P. Fritzlen move for judgment by default againts said defendant Boatsmens Bank on the causes of action stated in the answer of said defendant D. G. Fritzlen, and it appearing to the satisfaction of the court that said defendant, D. G. Fritzlen, did not give notice to said defendant Boatmens Bank of the filing of said answer containing the causes of action therein against said defendant Boatmens Bank either before or after the filing of said answer of said D. G. Fritzlen and that said defendant had no notice thereof until some time after the filing of said answer: It is now ordered on the application of said Boatmens Bank that said Bank be and it is hereby permitted to file the several motions to strike out the said answer of said Fritzlen and to strike out plaintiff's reply and for judgment in favor of said Bank, which motions were filed herein on June 11th, 1904, to which the said D. G. and Edna P. Fritzlen objected and excepted.
>
> "And it is further ordered that said motion of D. G. Fritzlen and Edna P. Fritzlen for judgment by default against said defendant Boatsmens Bank be and the same is hereby overruled, to which action of the Court said defendants Fritzlen at the time duly excepted.
>
> "Thereupon, by leave of Court, said Boatmens Bank filed a demurrer herein to paragraph two of

said separate answer of defendant D. G. Fritzlen, and thereupon said defendant Boatmens Bank, by leave of Court, filed a separate demurrer as to paragraph three of the separate answer of defendant D. G. Fritzlen, and thereupon, said defendant Boatmens Bank, by leave of Court, filed a demurrer herein to the reply of plaintiff herein."

It thus appears that as to the causes of action thus pleaded in Fritzlen's answer, Fritzlen, both by himself and counsel and also by the court, was treated as plaintiff in the case and the bank as a defendant. And it will be observed in passing that Weldon took no part in the controversy. He was simply a looker-on and next friend, a nominal party who took his mortgages and prosecuted this suit for Fritzlen's benefit.

Again, at the trial by the court and jury, of the common law action for damages pleaded by Fritzlen in his answer against the bank for breach of contract, the court in its charge to the jury everywhere speaks of Fritzlen as a cross-petitioner against the bank. The instructions of the trial district court on that trial may be found in the printed record herein from p. 106 to 114. From p. 107 to 114 those instructions of the trial district court to the jury were wholly devoted to the issues between Fritzlen and the bank on said common law count in Fritzlen's answer for damages for breach of contract. In the language near the bottom of p. 107 of the record, it will be found that the trial district court in those instructions to the jury, commences as follows: "In a pleading filed in this action in the nature of a cross-petition against his co-defendant Boatmens Bank, the defendant Fritzlen sets out a claim or cause of action against said bank for damages for an alleged breach of contract to furnish feed for his live-stock in the winter of 1902-3." Thereafter, through the entire body of the instructions given by the court, the court speaks of Fritzlen as a cross-petitioner

and speaks of his answer as a cross-petition against the bank.

So, in the final decree of the trial state court, which may be found from p. 66 to p. 81 of the record, the trial district court speaks of Fritzlen as the cross-petitioner. Thus, in the opening sentence of the findings of fact by the court, at p. 66, the court said: "I find that on the 30th day of November, 1901, the cross-petitioner, D. G. Fritzlen," etc. At two places on p. 67 of the record, the trial district court in its decree speaks of Fritzlen as the cross-petitioner. And in the middle of p. 67, the court speaks of the pleading of Fritzlen as the answer and cross-petition of the defendant D. G. Fritzlen, and so on throughout the entire decree.

But, as we have seen, the entire brief and argument of Weldon and Fritzlen in their joint brief and argument herein is based upon the contention that Fritzlen's answer was merely responsive to the bank's answer.

At the top of p. 16 of the joint brief of Weldon and Fritzlen, it is said:

> "The joinder of the non-resident bank is a mere incident to the principal purpose and object."

The principal purpose and object referred to here is the bringing of this suit by Weldon. The counsel of the plaintiffs in error, in speaking of the joining of the bank as a mere incident, are certainly in error. The controversy with the bank on the part of Fritzlen is the main and principal part of this entire suit. The joinder of Weldon is the incident in the case, and not the joinder of the bank.

The history of the case throughout shows that there never would have been a suit between Weldon and Fritzlen had it not been for the prior controversy between Fritzlen and the bank. The bank's mortgages were eight or nine months past due. The controversy

between Fritzlen and the bank over the loss of cattle by the snow storm in February, 1903, was on. In this condition of affairs, Weldon and Fritzlen caused to be made by Fritzlen to Weldon the note and mortgages of Fritzlen to Weldon due in ten days, and in a few days thereafter this suit was brought.

As is well said by the Circuit Court of Appeals, in its very able and exhaustive opinion, why was it necessary that Fritzlen should execute his note and mortgage to Weldon? Why did not Fritzlen make an absolute deed or conveyance conveying either a portion of the cattle or a portion of the land to Weldon? The making of the mortgage and the note by Fritzlen to Weldon due in ten days, and the bringing of this suit, were all parts of one scheme, which was to litigate in this case in the state court the pending controversies between Fritzlen and Weldon.

The litigation of the controversies between Fritzlen and the bank in the state court in this case, was the principal purpose and object of this suit, and not the litigation of any controversy between Weldon and Fritzlen. There was not and never has been any controversy between them to litigate.

At p. 24 of counsel's brief, it is said: "It is entirely true that the bank did not specifically pray for any foreclosure of its liens. The language of its prayer is "wherefore, having fully answered, said Boatmens Bank prays judgment and that it may go hence without day with its costs laid out and expended."

This remark of counsel is an explicit admission of what could not be denied, that the bank's answer was purely negative, that it did not seek a foreclosure of its liens by that answer. The logic and effect of that answer was, that the bank's mortgages being prior to those of Weldon, the bank was entitled to judgment against Wel-

don if the bank's mortgages were valid. And in this connection it must be observed that the bank's prayer for judgment against Weldon was effectual. The trial district court gave judgment and decree, as will be seen by the decree of the court, in favor of the bank and against Weldon. However, the trial court proceeded to take an account as between Fritzlen and the bank, of the amount due the bank on its mortgages, but the bank did not anywhere ask for affirmative relief. Counsel for plaintiffs in error are therefore in error when they say, at p. 25 of their brief, as follows:

> "It is entirely clear, therefore, that when the bank asked for 'judgment *and* that it may go hence without day with its costs,' it asked for such judgment as would be consistent with the case made by its answer, and when Fritzlen answered this pleading he intended to contest the right of the bank to have such a judgment against him."

This observation is erroneous for several reasons. The bank did not ask for any judgment, except such as a defendant asks at the end of a general denial. It gave in its answer the dates of its notes and mortgages because those dates were not given in Weldon's petition, but the bank asked for no judgment against Weldon, much less did it ask for any judgment against Fritzlen. Fritzlen at that time had not filed any pleadings and the answer of the bank was exclusively responsive to Weldon's petition. The bank was seeking and has always sought since the commencement of this litigation, the foreclosure of its real estate mortgage in the Federal Court, and it sought the foreclosure of its chattel mortgage by its action of replevin in the same court. But the bank's attitude in this suit has been entirely defensive from first to last.

From p. 27 to p. 30 of counsel's brief authorities are cited that in an equity suit, one defendant may file

a cross-bill against a co-defendant, where the subject of the cross-bill is germane to the suit of the plaintiff. But those were all cases prosecuted in good faith where there was a *bona fide* controversy between the parties to the suit.

Near the top of p. 30 of counsel's brief, they speak of Fritzlen as a necessary party. Of course he was a necessary party to a suit by Weldon to foreclose Weldon's mortgages, assuming that there was a *bona fide* controversy between Weldon and Fritzlen, but the bank was entirely unnecessary as a party to that suit. If we take the suit as a foreclosure of Weldon's mortgages, upon the basis that those mortgages were given in good faith and not as a part of a scheme to injure the bank, then the bank was an unnecessary and improper party to that suit.

If, on the other hand, the suit, as the entire record discloses, was gotten up for the purpose of settling the controversies between Fritzlen and the bank, then Weldon was an improper and unnecessary party to those controversies.

At the bottom of p. 30 and the top of p. 31 of counsel's brief, it is sought to give as an excuse for the words in Fritzlen's answer wherein he says: "This defendant for his cause of action against his co-defendant, the Boatmens Bank," that Fritzlen had the right to set up his causes of action as counter-claims to the bank. But the bank was not suing Fritzlen for anything. The bank was not seeking for the foreclosure of either its real estate or chattel mortgage in this suit. It was simply defending this suit against Weldon's petition. There never has been a time in the history of this case when the bank would not have been glad to have been dismissed by Weldon so that it would not have had any connection with this suit. The claim and contention, therefore, of counsel that Fritzlen's answer consists of counter-claims against the bank cannot be sustained.

If the bank had chosen to obtain foreclosure of its real estate and chattel mortgages in this case, by filing a cross-bill against Weldon and Fritzlen, then there would be color of reason for the contention of counsel that their causes of action herein might be considered as counter-claims.

The Circuit Court of Appeals, in its decision in this litigation, expressly decided that the bank had a right to foreclose its mortgage in the Federal Circuit Court, and it remanded the judgment of dismissal in the replevin action, so that the bank might obtain its foreclosure so far as the personal property was concerned in that replevin action in the Federal Court. If, therefore, Fritzlen has a proper counter-claim by which he can reduce the bank's mortgage indebtedness, the action to foreclose the real estate mortgage in the Federal Circuit Court and the replevin action in the same court are the proper suits in which to set up those counter-claims.

The trial district court, however, did not consider the causes of action set up by Fritzlen in his answer as in anywise counter-claims to the bank's mortgages. As we have seen, the trial district court, in its final decree, took an account of the amount due on the bank's mortgages as against Fritzlen. That account is set out at large in the decree and may be found at p. 72 to 77 of the record. The court, however, although taking a very full account between Fritzlen and the bank, did not include in that accounting the item of $4,000 which the jury found Fritzlen should recover from the bank by reason of the breaches of the contract pleaded by Fritzlen in the common law action in the next to the last count of his answer. Instead, however, of including that verdict of $4,100 in that accounting, the court gave a separate judgment in the decree in favor of Fritzlen against the bank on that verdict which may be found at

the bottom of p. 79 of the record. And on its appeal to the Kansas Supreme Court a $10,000 supersedeas bond was required from and given by the bank. (Record, p. 79 and 80.)

This shows conclusively that the trial district court did not regard Fritzlen's common law actions set up in his answer against the bank, as being in any respect counter-claims to the mortgage indebtedness. On the contrary, the trial district court treated the jury trial, the verdict and the judgment in favor of Fritzlen against the bank on that cause of action the same as if there had been a separate suit brought by Fritzlen against the bank, without any reference to the mortgages held by the bank, or held by Weldon or by anybody else.

At pp. 37-88 of counsel's brief, they cite the cases of *Gardner* v. *Risher*, 35 Kan., 93, and *Clement* v. *Field*, 147 U. S., 467, to maintain the contention that Fritzlen had the right to plead his common law causes of action in this case. In those cases, the Kansas Supreme Court and this court held that in a replevin action the defendant, who had given a chattel mortgage to secure a debt, had the right to show that the debt had been paid and that therefore the plaintiff had no cause of action to maintain a suit of replevin on the chattel mortgage. But those cases are not authorities in favor of the proposition that Weldon and Fritzlen had the right to allow Fritzlen to maintain his common law actions in this case.

In point No. 4 of our points and authorities we have herein set out the Kansas statute which authorizes one defendant to plead as against a co-defendant, but that statute only authorizes one defendant to plead as against a co-defendant where he seeks relief "concerning the subject of the action."

The causes of action in Fritzlen's answer, having had no relation whatever to Weldon's mortgages, could

not be pleaded in this case by Fritzlen, as he was permitted to do. The decision of the Kansas Supreme Court and of this court in *Gardner* v. *Risher, supra,* and *Clement* v. *Field, supra,* do not furnish any authority for Fritzlen's answer in this case, for the further reason that the causes of action in Fritzlen's answer in this case are not set up in the replevin and foreclosure actions of the bank in the Federal Court. Those decisions of the Kansas Supreme Court and this court are only authorities in favor of Fritzlen if his so-called counter-claims were set up in the bank's foreclosure and replevin actions.

We do not wish to be understood as admitting that Fritzlen would have the right to set up his so-called counter-claims in the bank's foreclosure and replevin actions in the Federal Court. However, the last point in Fritzlen's answer wherein he seeks damages on account of the bank's replevin suit, can only be pleaded in that replevin suit pending in the Federal Court.

The replevin statute of Kansas which governs the bank's replevin action in the Federal Court may be found from p. 1046 to 1048 of the General Statutes of Kansas, by Dassler for 1905, and Sec. 5067 of that statute, to be found at p. 1047, provides that in the replevin action damages may be given for the plaintiff where the plaintiff recovers on account of the defendant's detention of the property, and that damages may be likewise given by the court in favor of the defendant against the plaintiff for damages for taking and withholding the property. The only tribunal, therefore, where the last cause of action of Fritzlen's answer could be litigated is in the bank's replevin action in the Federal Court. And if the cause of action in the next to the last count of Fritzlen's answer for breach of contract is a set-off against the bank's mortgage indebtedness, which we do not admit, that set-off can only be pleaded and maintained either in the fore-

closure suit of the bank in the Federal Court against Fritzlen's land, or in the replevin action. But it has not been so pleaded as a set-off in either of those suits. It was not pleaded as a set-off in this case and could not be so pleaded as a set-off because the bank is not a plaintiff in this case in any respect, and for the further reason, as we have already seen, that that cause of action of claim considered as a cross-bill has no relation whatever to the plaintiff's claim to Weldon's suit on his mortgages; and as we have already seen, the court does not treat it as a counter-claim or set-off by taking any account of it in the accounting as between Fritzlen and the bank of the amount due on the bank's mortgages. Besides a law action cannot be injected into an equitable cross-bill.

At p. 41, counsel speak of the action of the bank in taking the mortgaged cattle as being unlawful because Weldon had obtained a restraining order from the Probate Court. That restraining order was not of indefinite duration and was canceled and set aside by Judge Lochren of the Federal Court when he overruled the motions to remand in September, 1903. There was nothing, therefore, in that restraining order which prevented the bank from bringing its replevin action in the Federal Court, and it was explicitly decided by the Federal Circuit Court of Appeals in this litigation, that the bank had a right to maintain said replevin action and to foreclose its mortgages in the Federal Court. And that holding was affirmed by this Court by its refusal to grant the *certiorari*.

In any view, therefore, the only tribunal or place where Fritzlen's claim for damages for the taking of the property by the bank could be litigated is in the bank's replevin action in the Federal Court.

At p. 43 of counsel's brief, it is suggested "that after the remand of the case to the state court the non-resident

defendant filed an answer setting up a defense and a counter-claims; that this counter-claim consisted of an assertion of liens against the property of the co-defendant Fritzlen; that responsive to this counter-claim Fritzlen answered, setting out matters of defense and of recoupment."

There are no grounds whatever, we submit, for this statement. The bank did not set up any counter-claim. It relied upon its mortgages as a defense to Weldon's action, as it had a right to do. Even if it had been conceded that the suit, if considered a *bona fide* one, involved the question of the validity of the bank's mortgages, and conceding that Fritzlen would have been and is bound by the determination of the validity of the bank's mortgages, still the issue as to the validity of the bank's mortgages does not involve any question as to the amount due the bank upon its mortgages.

The question of the amount due on the bank's mortgages can only be ascertained and determined in its foreclosure suit in the Federal Court. It, therefore, still follows that, so far as Weldon's petition and the bank's answer were concerned, no issue was or could arise in this suit as to the amount of indebtedness due from Fritzlen to the bank on its mortgages. All that was involved so far as the bank's mortgages are concerned, by the petition of Weldon and the bank's answer thereto, is the validity of the bank's mortgages. They do not and did not involve any question as to the amounts due on those mortgages, and no inquiry in this action could be lawfully taken as to the amount due on the bank's mortgages.

Commencing at p. 43 of counsel's brief and continuing to the conclusion of the brief, counsel centend that there are not sufficient averments in the bank's second removal petition, of fraud on the part of Weldon and Fritzlen. The second removal petition seems to be treated

by counsel as if there was only a general averment of fraud without any statement of facts. In this the counsel are again in error. That part of the bank's second removal petition which charges fraud may be found at pp. 62 and 63 of the record, and are in the following words:

> "Said defendant, Boatmens Bank, further avers and shows to the Court that this suit in its inception and in the conducting thereof was and has been fraudulently instituted and maintained by plaintiff Weldon and defendants Fritzlen for the purpose of fraudulently preventing this defendant, Boatmens Bank from removing this action to the U. S. Circuit Court as prayed for in this petition; that said Boatmens Bank has no interest whatever in the mortgages and note held by plaintiff and made to him by defendant Fritzlen and mentioned in plaintiff's petition in this cause, and that as appears from said separate answer of defendant, D. G. Fritzlen, there was and has been and is now no controversy between plaintiff and defendant Fritzlen as to the said mortgages and note of plaintiff and the foreclosure thereof, and said defendant, Boatmens Bank further charges and avers that this suit was brought in the manner and form of the bringing of the same not for the purpose of adjudicating or settling any controversy between plaintiff Weldon and the defendants Fritzlen, but for the purpose, fraudulently, of enabling the defendant Fritzlens to mainttain their said suit set up in their said separate answer herein against this defendant, Boatmens Bank, and to litigate the same in the State Court, and to prevent the trial of said controversy between said Fritzlens and this defendant, Boatmens Bank, in the United States Circuit Court.
>
> "The defendant Boatmens Bank further avers and states that the defendant Fritzlens herein were and have been in default from the time of the institution of this suit until the filing of said separate answer herein by and with the consent, connivance and collusion of the plaintiff herein, and that by agreement between plaintiff and defendant Fritz-

lens the said separate answer of D. G. Fritzlen was withheld and not filed until after the remanding of this cause on the first petition filed by this petitioner so as to prevent its being made to appear while this action was pending on said former petition in the United States Court that this suit was maintained for the fraudulent purposes aforesaid, and that the controversies herein were wholly between citizens of different states."

The above quotation from the second removal petition contains several charges of facts as being fraudulent. It is charged in a portion of the removal petition that the plaintiff has no interest whatever in Weldon's mortgages; it is further charged therein that there never has been any controversy between plaintiff and defendant Fritzlen as to Weldon's mortgages. The fact that there never has been any controversy between Weldon and Fritzlen and that, therefore, this suit was wholly unnecessary so far as they were concerned, and that Fritzlen, if he had desired to secure and take care of Weldon, could have made a conveyance direct to him, and the fact that there never has been any controversy between them are stated as facts evidencing the fraud. It is further charged that this suit was brought in the manner and form of bringing the same, not for the purpose of adjudicating or settling any controversy between Weldon and Fritzlen, but for the sole purpose of litigating the controversies between Fritzlen and the bank and to prevent the trial of the controversy between Fritzlen and the bank in the United States Court.

As further evidencing the fraud that is charged, it is stated and charged that the Fritzlens were and had been in default from the time of the institution of this suit until the filing of said separate answer of Fritzlens, and that that was with the consent, connivance and collusion of Weldon. And it further charged an agreement between plaintiff and the Fritzlens that said answer

of Fritzlen might be withheld and not filed until after the remand of this cause on the first petition, so as to prevent its being made to appear while this action was pending in the United States Court that it is maintained for the fraudulent purpose aforesaid.

It seems to us that the clause of the second removal petition quoted above is very full and explicit as to some of the facts which constitute the fraud of Weldon and Fritzlen in this case. Besides, in the record proper in this case it appeared that after the controversies arose between Fritzlen and the bank, Fritzlen unnecessarily made his note and mortgages due in ten days, to Weldon's order, and that is a fact standing by itself evidencing the fraud of the parties. Of course any fact that appears in the record in this case, and that not only appears in the record but from the face of Weldon's petition, was a fact not necessary to be repeated in the removal petition of the bank. So that the authorities cited by counsel at pp. 48 to 50 of their brief, to the effect that a mere general charge of fraud without any statement of facts, had no application to this case. The decisions there cited were in actions brought for fraud where there was a general charge of fraud and conspiracy without any statement of facts. But those cases have no application to this case, for the reason, as we have seen, that the fraud of Weldon and Fritzlen in this case was specifically and fully charged in the second removal petition and accompanied by a statement of facts therein which conclusively shows the fraud, according to adjudications and decisions in this case, of the United States Circuit Court of Appeals and of the Kansas Supreme Court. Both of those courts have found the fact of fraud as charged in that petition.

Counsel argue that there could not have been any fraud between Weldon and Fritzlen if Fritzlen was honestly indebted to Weldon. We do not see how that conclusion follows.

From p. 51 to the end of counsel's brief, they cite authorities, consisting of decisions of this court, to the effect that where a party in one state conveys real estate to a party in another state, such last party in the other state may maintain an action of ejectment in the Federal Court of the state where the assignor resided, if the deed of conveyance transmits the title and benefit of the grantee. And from those counsel seems to deduce the conclusion that in this case Fritzlen was honestly indebted to Weldon and made his mortgage payable in ten days to secure that indebtedness, then the bank did not have the right to remove this case. We do not see how those decisions can be applied to this case. The qestion here is not whether Fritzlen owed Weldon. The question is whether there was any controversy between them, and whether the controversy which they got up in form was not a mere counterfeit and simulation of a controversy. If the controversy between them was not a genuine one, but was simulated for the purpose of bringing the bank and Fritzlen into court to litigate their controversies in this action, then the fact that Fritzlen was honestly indebted to Weldon can have no influence in determining the question.

The decisions of this court cited by counsel might apply if there had been a *bona fide* controversy between Weldon and Fritzlen growing out of the giving of the Weldon mortgages and Weldon had made assignment of those mortgages and his indebtedness to some party in Colorado or Missouri and the assignee were to bring suit against Fritzlen in the Kansas Federal Court. But those decisions have no application to the question here as between Fritzlens and the bank.

In the case of *Lehigh Mining & Manufacturing Co.* v. *Kelley*, 160 U. S., 327, which is cited by counsel, this court, at p. 334 of the report, quoting from the case of *McDonald* v. *Smalley*, 1 Pet., 620, also cited by counsel, says:

> "The true and only ground of objection in all these cases is, that the assignor or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then in fact a controversy between the former and the defendants, notwithstanding the conveyance; and if both parties are citizens of the same state, jurisdiction, of course cannot be upheld."

In the case at bar Weldon is only a nominal party, it being true here as it was in the above decision that "his name is being used merely for the purpose of jurisdiction." In this case Weldon's name is being used just the same as if there were a *bona fide* controversy between him and Fritzlen. If in such case he had assigned the Fritzlen mortgages to some party in Colorado or Illinois, with the understanding that a suit should be prosecuted in the Kansas Federal Court for the use and benefit of him (Weldon) against Fritzlen, then the cases cited would apply.

The argument of counsel from p. 43 to the end of their brief is practically a confession that the purpose of Weldon and Fritzlen in making the mortgages from Fritzlen to Weldon actually was to prevent this suit from being removed by the bank. And the argument of counsel is that the mere motive and purpose of Weldon and Fritzlen in the making of those mortgages to prevent the removal of this suit by the bank cannot avail the bank in its contention of the right to remove. That is to say, such motive on the part of Weldon and Fritzlen cannot avail the bank if Fritzlen was actually indebted to Weldon.

As we have seen, the fact of indebtedness is immaterial if there was no controversy between them, and if the whole intention and purpose of making the mortgages and bringing this suit was to enable Fritzlen to

itigate his controversy with the bank in this case in the tarte court and to prevent the removal.

At the botom of p. 62 of counsel's brief, it is suggested that the bank at the time of filing its answer on May 14, 1904, had been in default from September 4, 1903. In this suggestion counsel are entirely in error. The record shows that the bank, on August 13, 1903, filed a demurrer to Weldon's petition. (p. 26, Rec.) The record futhermore shows that on May 16, 1904, the bank withdrew said demurrer to Weldon's petition and filed its answer. (pp. 33-34, Rec.)

IV.

Defendant in error submits in conclusion that its motion herein to dismiss the writ of error for want of jurisdiction should be sustained, and that in the event that said motion to dismiss should be denied, then that the judgment of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

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ODUS G. YOUNG,
Attorneys for Defendant in Error.

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

D. G. FRITZLEN, ET AL., *Plaintiffs in Error,*
vs.
BOATMENS BANK, *Defendant in Error.*
} No. 345.

Error to the Supreme Court of Kansas.

MOTION TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

Now comes said Boatmens Bank, the defendant in error in the above cause, and moves the court to dismiss the writ of error in this cause for want of jurisdiction in this court to take cognizance of this case on said writ of error.

In support of this motion, defendant in error submits the following statement, reasons and authorities:

This case was brought by plaintiff in error, W. H. Weldon, against the plaintiffs in error, D. G. Fritzlen and Edna P. Fritzlen, and defendant in error, the Boatmens Bank, in the District Court of Clark County, Kan-

sas, in July, 1903. The Boatmens Bank entered its appearance in that case in August, 1903, filed a petition and bond for a removal of the cause to the Circuit Court of the United States in the District Court of Kansas, Second Division, in which said Clark County, Kansas, was situated, and said cause was docketed in said United States Circuit Court at Wichita, the place of the holding of said court, in said August, 1903.

At the regular term of the said United States Circuit Court at Wichita, in September, 1903, motions were made in said cause by the plaintiff therein, Weldon, and by defendants, D. G. Fritzlen and Edna P. Fritzlen, to remand said cause to said Clark County, Kansas, District Court. Said motions were heard and by the court overruled.

After the said decision of said United States Circuit Court on said motions to remand and after said court had decided that it had jurisdiction in this cause, and in the following month of October, 1903, said Boatmens Bank instituted a suit of replevin in said United States Circuit Court for the District of Kansas, Second Division, against said other parties, D. G. Fritzlen, Edna P. Fritzlen and W. H. Weldon, to recover the cattle covered by said bank's mortgage which had been given by said Fritzlen and Fritzlen, and which cattle were also involved in said action of W. H. Weldon against said other parties, so removed to said United States Circuit Court. The order of delivery was sued out in said replevin action so brought by said bank, in October, 1903, and under that order of delivery the Marshal of the United States for the District of Kansas, took said cattle and delivered them to said bank, on the giving of a replevin bond in that action.

Afterwards said United States Circuit Court entertained another motion by said Fritzlens to remand said

cause, and that motion was sustained and this cause was remanded to said Clark County District Court on said second order. At about the same time a motion was made in said replevin action, by said Fritzlen, to dismiss the same on the ground that said replevin action conflicted or presented a case of conflict between the jurisdiction of said Circuit Court in said replevin action and the said District Court of Clark County, Kansas, in this case. This last motion to dismiss the replevin action was sustained at the same time that this suit by Weldon was remanded, and the bank sued out a writ of error in said replevin action to the United States Circuit Court of Appeals of the Eighth Circuit. In due time said replevin action on said writ of error was heard by said United States Circuit Court of Appeals, and the judgment in said replevin action, of dismissal, so given by said Circuit Court of the District of Kansas, was reversed.

The point presented to said United States Circuit Court of Appeals on said writ of error in said replevin action was whether this suit was pending in the United States Circuit Court, or in the state District Court of Clark County, Kansas, at the time of bringing said replevin action. It was contended by said bank that at the time of bringing said replevin action in October, 1903, this cause was pending in the Circuit Court for the District of Kansas, the motion to remand having at that time been denied, and jurisdiction of this cause being entertained by said United States Circuit Court. It was contended by the Fritzlens in said Circuit Court of Appeals that this cause had never been pending in the Circuit Court of the United States for the District of Kansas, notwithstanding said holding in September, 1903, overruling said motions to remand. The United Statets Circuit Court of Appeals for the Eighth Circuit, decided

said point in favor of the bank, that this cause was properly removed on said petition and bond of the bank, and that the order of said Circuit Court of the United States overruling said motions to remand was proper.

The opinion and judgment of the United States Circuit Court of Appeals, reversing said judgment in said replevin action for the reasons aforesaid and remanding the cause, may be found reported in Vol. 135 Fed. Rep., 650, and in Vol. 68 C. C. A., 288.

After said decision of the United States Circuit Court of Appeals, said replevin action was sought to be removed to this court by a petition for *certiorari,* and said petition for *certiorari* was denied by this court. (*Fritzlen et al., petitioners* v. *Boatmens Bank,* 198 U. S., 586, 587.)

As will be seen by the petition of the Fritzlens, who are petitioners in that case, still on file in this court, the propositions and arguments adduced therein in support of that petition by said Fritzlens, were that this case, notwithstanding said decision of the United States Circuit Court of Appeals, was not a removable case from said state District Court of Clark County, Kansas, to said United States Circuit Court.

After this cause was so remanded to said state District Court of Clark County, Kansas, on said second motion to remand, by the order of said United States Circuit Court, the said parties appeared in said case of *Welden* v. *Fritzlen and Boatmens Bank,* in said District Court of Clark County, Kansas, and thereafter said Boatmens Bank filed in said cause in said District Court of Clark County, Kansas, its second petition and bond for the removal of this cause to said United States Circuit Court. Said second removal petition was based upon the changed conditions in this cause made therein after said remand from said United States Circuit Court.

Said second removal petition was denied by said state District Court of Clark County, Kansas, and the parties proceeded to the trial of said cause in said District Court, and, on an adverse judgment and decree against the Boatmens Bank, it removed the case to the Supreme Court of the state of Kansas, for hearing therein under and in accordance with the laws and rules of practice of that state.

After the hearing of this cause in said Supreme Court of Kansas said last named court, on April 6, 1907, gave judgment reversing the said judgment and decree herein of said District Court of Clark County, Kansas, said Supreme Court of the state of Kansas holding and adjudging that said Boatmens Bank was entitled to a removal of this cause on said second removal petition.

The opinion herein of said Supreme Court of Kansas so given on April 6, 1907, may be found fully reported in Vol. 89 Pac Rep., 915, being the May 20, 1907, number of said Pacific Reporter. Said opinion may be also found in full, printed in the appendix to this motion.

The point decided by said Supreme Court of Kansas herein, as will be seen by its opinion, was, that this case, while not removable under the first removal petition filed therein, was and had become a removable case at the time of the filing of the second petition for removal by said bank herein, by reason of the changed conditions in this cause after the remanding thereof from the United States Circuit Court to the state District Court.

On this state of facts, the sharp point presented by this motion is, that since the state Supreme Court in this case sustained the right of removal and has given effect to the right, title and privilege claimed by the bank under the constitution and laws of the United States, no writ of error lies to this court to review that decision, that the decision of the Supreme Court of Kansas could only be

reviewed by this court on writ of error if the decision of that court had been adverse and not favorable to the right of removal claimed by the bank.

A title, right, privilege or immunity, under the laws of the United States, in order to confer jurisdiction on the United States Supreme Court by a writ of error to a state Supreme Court, must have been invoked in the state Supreme Court by the plaintiff in error to the United States Supreme Court and denied by the state Supreme Court. It is not sufficient to confer such jurisdiction on the United States Supreme Court that the federal right, title or privilege was invoked by the other party in the state court and confirmed and given effect in the state Supreme Court. The federal right, title or privilege must have been denied, and not confirmed or given effect.

In this case, the federal right, title and privilege of the bank of removal under the Constitution and laws of the United States has been confirmed and given effect by the highest court in Kansas, whose decision was not "against" the federal right or title claimed, and a writ of error to the United States Supreme Court from that decision, therefore, does not lie.

Rev. Stat. U. S., Sec. 709;
2 Destey's Fed. Proceed. (9 Ed.) p. 766, Sec. 223;
Vol. 4 Fed. Stat. Am., p. 467-481;
Linton v. *Stanton,* 12 How., 423;
Manning v. *French,* 133 U. S., 186;
Giles v. *Little,* 134 U. S., 645;
Missouri v. *Andrianno,* 138 U. S., 496;
McNulta v. *Lochridge,* 141 U. S., 327;
Ludwig v. *Chaffee,* 143 U. S., 301;
Stradee v. *Baldwin,* 9 How., 261;
R. R. Co. v *Johnson,* 151 U. S., 81;
Mining Co. v. *Nesbit,* 177 U. S., 523;

Kizer v. *R. R. Co.*, 179 U. S., 199;
Judge Amos M. Thayer on Fed. Jur., Secs. 54-55, pp. 40-41;
Baker v. *Baldwin*, 187 U. S., 61.

The decision of a state Supreme Court confirmatory of a federal right or title claimed, is as final and binding, both from direct and collateral attack, as if made by the United States Supreme Court, where its writ of error brings up an adverse decision. The state Supreme Judges, pursuant to the United Statets Constitution, Art. 6, are sworn to uphold and maintain the Constitution and laws of the United States; they, under our system, are part of the federal judiciary, and their decisions confirmatory of rights, titles or privileges claimed thereunder are equally binding the same as if given by the federal Supreme Court. Such has been our federal judicial policy under the Federal Judiciary Acts from the twenty-fifth section of the Judiciary Act of 1879 until now. Therefore, the dccision of the Kansas Supreme Court not being appealable, is in this particular litigation between these parties, not open to collateral attack, either in the United States Circuit Court or in the United States Supreme Court on certificate or appeal thereto from the Circuit Court. If the United States Supreme Court is without power on direct appeal or writ of error to the state Supreme Court, to set aside its decision, then that decision is not open to collateral attack from or in any quarter. It is as final as if given by this court on a writ of error, if the decision of the state court were adverse to the federal right.

If this case had been decided by the Kansas Supreme Court the other way and the said Kansas Supreme Court had held that this was not a removable case, this court would have had jurisdiction to review that decision by writ of error.

R. R. Co. v. *Fitzgerald,* 160 U. S., 556;
Stone v. *So. Car,* 117 U. S., 430;
Kanouse v. *Mastin,* 14 How., 23; 15 How., 198;
Oakley v. *Goodman,* 118 U. S., 43.

But it has never been held that a writ of error from this court lies to the state Supreme Court, where the right of removal under the Constitution and laws of the United States is sustained and not denied. We suppose there is no difference between the determination of this question where the right claimed under the Constitution and laws of the United States is a right of removal to a federal court, and a case where some other federal right, title or privilege is involved. In other words, the jurisdiction of this court to issue a writ of error to the state Supreme Court, is the same where the federal right, title or privilege is the right of removal of a case to a federal court under the Constitution and laws of the United States, as where the federal right, title or privilege is under some other provision of the Constitution or laws.

Nor can jurisdiction on this writ of error be entertained on the point made in the assignment of errors, that the Supreme Court of Kansas did not give due effect to the order of the United States Circuit Court remanding this cause to the state court. Of course it is well understood that that order to remand is not appealable, but the Kansas Supreme Court does not assume to review the order remanding this cause.

In the very opening paragraph of the opinion of the Kansas Supreme Court herein, the following language appears:

"Many errors are assigned in the rulings made in the various stages of the trial, but the first and controlling one is based on the decision denying the petition

for removal to the federal court. There was a remand on the first petition for removal, and under the Acts of Congress the decision on that motion is not reviewable." And then the court proceeds to distinguish between the first removal petition herein and the second removal petition herein, and without questioning the legal validity of the order to remand and the legal effect thereof, proceeds to consider the right of the bank to a removal on the second removal petition and adjudges that the bank had such right of removal on said second removal petition.

In view of these facts, it cannot be contended that the Kansas Supreme Court did not give effect to the order of remand.

As will be seen from the decision of the United States Circuit Court of Appeals (*Boatmen's Bank* v. *Fritzlen*, 135 Fed., 650; 68 C. C. A., 288) that court decided that the bank was entitled to a removal on the first removal petition, but of course this decision was not binding on the Kansas Supreme Court. That court was called upon to decide whether, irrespective of the decision of the United States Circuit Court of Appeals on the first petition, the bank was entitled to its removal on said second removal petition. The Kansas Supreme Court holds that, conceding that the motion to remand was properly sustained on the first removal petition, the case became removable on the second removal petition, so that it cannot be affirmed we repeat, that the Kansas Supreme Court did not give due effect to the order of the Circuit Court of the United States remanding the cause.

It is true that the record in this case has not been printed, but the facts stated in this motion fully appear from the reported decision of the United States Circuit Court of Appeals, 135 Fed., 650, and from the decision of the court herein on the petition for *certiorari*, 198 U.

S., 586, and from the opinion of the Kansas Supreme Court printed in the appendix to this motion. All of the facts necessary for the court to decide this motion fully appear in that opinion, without the printing of the record. The opinion of the Kansas Supreme Court herein shows all the facts.

The premises considered, said Boatmen's Bank, defendant in error herein, moves the court to dismiss the writ of error in this cause for want of jurisdiction.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Boatmens Bank,
Defendant in Error.

JAMES S. BOTSFORD,
Of Counsel.

APPENDIX.

BOATMEN'S BANK OF ST. LOUIS, MO., v. FRITZLEN et al.

(Supreme Court of Kansas, April 6, 1907.)

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—IMPROPER JOINDER OF PARTIES.

The institution of a fictitious action in a court of the state of which the plaintiff is a citizen, for the purpose of bringing two defendants of diverse citizenship, one being a non-resident, into such court, to enable the resident defendant to litigate a cause of action against the non-resident defendant in that court, and to prevent the non-resident defendant from removing such cause into the federal court, is a fraud upon the jurisdiction of the federal court and upon the non-resident defendant, and upon a seasonable application by the non-resident defendant the sham plaintiff should be disregarded and the real controversy removed to the federal court.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, Sec. 79.)

2. SAME—PROCEEDINGS—JURISDICTION OF STATE AND FEDERAL COURTS.

The averments of fraud, as well as all issues of fact raised by the petition for removal, are to be tried in the federal court. The only question for a state court to decide is one of law, whether, admitting the facts alleged in the petition and disclosed by the record to be true, the cause is a removable one.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, Secs. 193, 195.)

3. SAME—TIME FOR PROCEEDINGS.

A petition for removal is filed in time if it is filed by the defendant as soon as the record in the cause or the acts of the parties show it to be a removable cause.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, Secs. 135-140.)

4. SAME—ESTOPPEL.

The time within which a cause may be removed, being a requirement of mode and form, and not of jurisdiction,

is a subject of waiver and estoppel, and a party who fraudulently attempts to prevent a removal, whereby the defendant fails to file his petition for removal within the statutory time, will not be allowed to take advantage of his own wrong, but will be estopped to object that the petition for removal was not filed in time.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, Secs. 137, 140.)

5. SAME—IMPROPER JOINDER OF PARTIES.

In considering a petition for removal, a court should disregard an improper or sham party who has injected a fictitious cause of action into the case, and may arrange the actual parties on opposite sides of the real controversy according to their respective interests, and, if there then appears to be a controversy between citizens of different states, involving the requisite amount, the cause may be removed.

(Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, Secs. 79, 80.)

(Syllabus by the Court.)

On July 23, 1903, W. H. Weldon instituted an action in the district court of Clark county, Kan., asking for judgment for $3,750 against D. G. Fritzlen and Edna P. Fritzlen upon a promissory note executed July 2, 1903, due 10 days after date, and to foreclose mortgages on real and personal property of the Fritzlens. The Boatmen's Bank of St. Louis, Mo., was named as a defendant, and it was alleged that the bank claimed some interest in the mortgaged property under mortgages held by it, but that these were illegal and of no effect. On August 13, 1903, the Boatmen's Bank filed its petition and bond for removal to the United States Circuit Court for the District of Kansas, in which it was alleged that it was a citizen of Missouri, and that Weldon and the Fritzlens were citizens of Kansas; and it stated as a first ground of removal that there was a separable controversy between Weldon and the bank, and as a second ground that the bank could not obtain justice in that court because of prejudice and local influence. The controversy reached the federal court on September 14, 1903, when the motions of Weldon and the Fritzlens to remand were considered and denied. On October 9, 1903, the Boatmen's Bank brought a replevin

action in the federal court to recover the personal property of the Fritzlens covered by the bank's mortgage. On April 2, 1904, the motions to remand were renewed, and later an order was made sustaining the motions and remanding the cause to the state court. *Weldon* v. *Fritzlen* (C. C.) 128 Fed., 608. On April 25, 1904, the motion of the Fritzlens to dismiss the replevin action was sustained by the federal court, but that judgment was subsequently reversed by the United States Circuit Court of Appeals. *Boatmen's Bank* v. *Fritzlen,* 135 Fed., 650, 68 C. C. A., 288. On May 14, 1904, the bank filed an answer which, in effect, denied the allegations of Weldon's petition, but asked for no affirmative relief. On May 26, 1904, Weldon filed a reply to the bank's answer, and on the same day D. G. Fritzlen filed an answer in the case, which admitted the execution of the Weldon note and mortgages, but denied that he was indebted to the plaintiff in the amount claimed. He then set up as a first defense against the bank's note and mortgages that illegal commissions for the sale of cattle were included in the note, and that they were therefore void. A second defense was that the bank was a foreign corporation, and that it had not been authorized to do business in Kansas. As a third defense, he set up a counterclaim for $20,000 as damages for the breach of a contract, and, as a fourth defense, set up a counterclaim for $25,000 for the conversion of the personal property which the bank had taken under a writ of replevin. The first and second defenses of Fritzlen's answer against the bank was identical with the defenses set forth in Weldon's reply to the bank's answer. On June 10, 1904, the bank filed its second petition and bond for removal, alleging, first, that there was a separable controversy; and, second, that the action was fraudulently brought by Weldon and Fritzlen to prevent a removal of the cause to the federal court, and to defeat the jurisdiction of the federal court over the real controversy between the bank and the Fritzlens.

On this ground the bank alleged: "* * * This defendant, Boatmen's Bank, further shows and avers that this defendant had no knowledge either by its officers or attorneys of the filing of said separate answer of defend-

ant D. G. Fritzlen and said reply of plaintiff on May 26, 1904, until Saturday, June 4, 1904, on which last day the attorneys of said bank were furnished with copies of said answer and reply by the clerk of the district court, and that the time within which this defendant, Boatmen's Bank, is required to plead or answer to said separate answer, has not yet expired according to the statutes or the rules of practice of the state of Kansas, and that neither said Boatmen's Bank or its attorneys herein have been served with said separate answer of defendant D. G. Fritzlen, or required by an order of court to plead, answer, or demur to said separate answer, and that said separate answer is in all that is contained therein, after paragraph 1, a new suit on the part of D. G. Fritzlen against this defendant, Boatmen's Bank. Said defendant, Boatmen's Bank, further avers and shows to the court that this suit in its inception and in the conducting thereof was and has been fraudulently instituted and maintained by plaintiff Weldon and defendant Fritzlen for the purpose of fraudulently preventing this defendant, Boatmen's Bank, from removing this action to the United States Circuit Court, as prayed for in this petition; that said Boatmens Bank has no interest whatever in the mortgages and note held by plaintiff and made to him by defendant Fritzlen and mentioned in plaintiff's petition in this cause, and that, as appears from said separate answer of defendant D. G. Fritzlen, there was and has been and is now no controversy between plaintiff and defendant Fritzlen as to the said mortgages and note of plaintiff and the foreclosure thereof, and said defendant, Boatmen's Bank, further charges and avers that this suit was brought in the manner and form of the bringing of the same, not for the purpose of adjudicating or settling any controversy between plaintiff Weldon and the defendants Fritzlen, but for the purpose, fraudulently, of enabling the defendants Fritzlen to maintain their said suit set up in their said separate answer herein against this defendant, Boatmen's Bank, and to litigate the same in the state court, and to prevent the trial of said controversy between said Fritzlens and this defendant, Boatmen's Bank, in the United States Circuit Court. The defendant Boatmen's

Bank further avers and states that the defendants Fritzlen herein were and have been in default from the time of the institution of this suit until the filing of said separate answer herein, by and with the consent, connivance, and collusion of the plaintiff herein, and that by agreement between plaintiff and defendants Fritzlen the said separate answer of D. G. Fritzlen was withheld and not filed until after the remanding of this cause on the first petition filed by this petitioner so as to prevent it being made to appear while this action was pending on said former petition in the United States Court that this suit was maintained for the fraudulent purposes aforesaid, and that the controversies herein were wholly between citizens of different states. * * * "

The petition for removal was denied, and the trial which followed in the district court resulted in favor of Weldon and the Fritzlens. The bank complains.

Bottsford, Deatherage & Young, for plaintiff in error. H. J. Bone, D. R. Hite, and Francis C. Price, for defendants in error.

JOHNSTON, C. J. (after stating the facts). Many errors are assigned on the rulings made in the various stages of the trial, but the first and controlling one is based on the decision denying the petition for removal to the federal court. There was a remand on the first petition for removal, and under the act of Congress the decision on that motion is not reviewable (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]). In its first petition the bank, a citizen of Missouri, insisted that it had a separable controversy with the plaintiff, and alleged, as a second ground, prejudice and local influence. The first petition did not raise the issue of fraudulent joinder, but, when D. G. Fritzlen answered and disclosed the conspiracy and fraudulent purpose of Weldon and Fritzlen and the theory on which they intended to proceed, the second petition was filed on the ground of diversity of citizenship, and it alleged that the action had been fraudulently instituted and maintained by Weldon, not to adjudicate any controversy with the Fritzlens, but for the faudulent purpose of preventing the bank from removing the case to the federal court for a

trial of the causes of action against the bank set forth in the answer and cross-petition of D. G. Fritzlen.

Was the bank entitled to an order of removal on the second petition, and at that time? The right of removal as given by the Constitution and laws of the United States cannot be defeated by ay artifice or device of parties. It is well settled that the joining of nominal parties, sham parties, or of persons fraudulently brought in to prevent removal will not defeat the right of removal by the real party in interest, if the jurisdictional facts exist as to him. In speaking of devices of this character, in *Arapahoe County* v. *Railroad Co.* (U. S. C. C.) 4 Dill. 277, Fed. Cas. No. 502, Justice Miller said: "It would be a very dangerous doctrine—one utterly destructive of the rights a man has to go into the federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in the federal courts. We must, therefore, be astute not to permit devices to become successful which are used for the very purpose of destroying that right." In *Dow* v. *Bradstreet* (C. C.) 46 Fed. 824, it was alleged in a petition for removal that a resident defendant had been joined with a non-resident defendant to prevent a removal, and that the resident defendant was a sham party, with no interest whatever in the controversy. On the right to remove the case Justice Shiras said: "The reasoning which sustains the doctrine, which is now too firmly established to be called in question, that in determining the jurisdiction of the Circuit Court of the United States regard will be had only to the citizenship of the real parties in interest, disregarding wholly all nominal or immaterial parties upon the record, seems to me to be equally applicable to cases wherein it is made to appear that a party, having in fact no interest in or actual connection with the subject of litigation, has been joined as a party with those actually interested, for the sole purpose of defeating the jurisdiction of the federal court. A fraud of this nature, if successful, deprives the citizen of a right conferred upon him by the Constitution and laws of the United States,

and it certainly must be true that it cannot be perpetrated without a remedy existing for its correction. Unless this be so, then it is possible to defeat in every instance the right of removal, when the same depends upon the citizenship of the adversary parties, by the easy device of joining as a party one who has no interest in the case, but who is a citizen if the same state as the plaintiff." *Prince* v. *Illinois Central Railway Co.* (C. C.) 98 Fed. 1, was a case brought by a brakeman, a citizen of Kentucky, for an injury inflicted by the railway company, a citizen of Illinois. He joined as defendants two employes of the company, citizens of Kentucky. On a petition for removal, it was alleged that these employes were named as defendants in fraud of the jurisdiction of the federal court, and solely for the purpose of preventing a removal of the action. Later, upon an issue joined in the federal court on the subject of fraud, it was shown that neither of them had any connection with the injury or any responsibility for it, and it was remarked: "The court is therefore of the opinion that the joinder of Carroll and Smith, under the circumstances, is equivalent to a fraud upon the jurisdiction of this court, which it would be discreditable to wink at or fail to see."

It is true, as defendants in error contend, that a plaintiff is entitled to present his theory of the case in his petition and in his own way, and, when he elects to bring a joint action, a defendant has no right to insist that it shall be several, nor can he convert it into a several action by the answer which he files. Many cases, including *Alabama Great Southern Railway Co.* v. *Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, affirm this doctrine, but that case, as well as those which it follows, proceeds upon the theory that the parties are acting in good faith. In that case the court in its opinion stated that there was nothing in the case to suggest an attempt to commit a fraud upon the jurisdiction of the federal court. The court, however, cautiously pointed out an exception which should be made where there were fraudulent attempts to prevent removals. It was said: "The fact that by answer the defendant may show that the liability is several cannot change the character of the case

made by the plaintiff in its pleading so as to affect the right of removal. It is to be remembered that we are not now dealing with joinders which are shown by the petition for removal or otherwise to be attempts to sue in the state courts with a view to defeat federal jurisdiction. In such cases entirely different questions arise, and the federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in federal courts of the protection of their rights in those tribunals." In the more recent case of *Wecker* v. *National Enamling Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. ——, the question of fraudulent joinder was brought directly before the Supreme Court of the United States. There Wecker, a citizen of Missouri, brought an action against a corporation, a citizen of New Jersey, for injuries alleged to have been occasioned through negligence. He joined with the corporation one Wettengal, a citizen of Missouri. In a petition for removal it was alleged that Wettengal was fraudulently joined as a defendant, for the purpose of fraudulently preventing, or attempting to prevent, the defendant from removing the cause to the United States Circuit Court, and that plaintiff well knew that Wettengal's relation to the corporation was not such as to make him liable, and that he was not joined in good faith, but to prevent a removal. An issue was formed on the motion to remand, but the Circuit Court found, on affidavits which were filed, that the joinder of Wettengal was palpably groundless and fictitious, and therefore denied the motion. The Supreme Court, on review, held that the trial court was right in its conclusions that Wettengal was joined for the purpose of defeating the right of removal, and in doing so it was said: "While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." To the claim that there was no proof that Wecker knew of Wettengal's

true relations to the defendant, and consequently that he could not be guilty of fraud in joining him, it was said that, "even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach." The following authorities support the doctrine announced above: *McHenry* v. *New York, P. & O. R. Co.* (C. C.) 25 Fed., 65; *Collins* v. *Wellington* (C. C.) 31 Fed. 244; *Arrowsmith* v. *Nashville & D. R. Co.* (C. C.) 57 Fed., 165; *Warax* v. *Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 72 Fed., 637; *Hukill* v. *Marysville & B. S. R. Co.* (C. C.) 72 Fed. 745; *Landers* v. *Felton* (C. C.) 73 Fed. 311; *Durkee* v. *Illinois Cent. R. Co.* (C. C.) 81 Fed. 1; *Union Terminal Ry. Co.* v. *Chicago, B. & Q. R. Co.* (C. C.) 119 Fed., 209; *Ross* v. *Erie R. Co.* (C. C.) 120 Fed. 703; *Kelly* v. *Chicago & A. Ry. Co.* (C. C.) 122 Fed., 286; *Boatner* v. *American Express Co.* (C. C.) 122 Fed. 714; *Crawford* v. *Illinois Cent. R. Co.* (C. C.) 130 Fed. 395; *Dishon* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 133 Fed. 471, 66 C. C. A. 345; *Boatmen's Bank* v. *Fritzlen*, 135 Fed. 650, 68 C. C. A. 288; *Knuth* v. *Butte Electric Ry. Co.* (C. C.) 148 Fed. 73; *Yawkey* v. *Richardson*, 9 Mich. 529, 81 Am. Dec. 769; *Illinois Cent. R. Co.* v. *Coley*, 89 S. W. 234, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370; *Southern R. Co.* v. *Litteson*, 74 N. E. (Ind App.) 898.

The averments in the petition for removal as to the bad faith and fraudulent purposes of Weldon and Fritzlen when accepted as true, make out a *prima facie* showing of an attempt to evade the jurisdiction of the federal court. Especially is this so when these averments are considered in connection with the statements in the pleadings of these parties which were on file when the petition was presented. According to the averments in the petition for removal, the action brought by Weldon was fraudulent in its inception, and had been fraudulently maintained. While he set up a note and mortgages against the Fritzlens, it was alleged by the bank that there was no controversy between Weldon and the Fritzlens as to the note or the foreclosure of the mortgages, and that there never had been any controversy with respect to these. Since Weldon had no controversy with the Fritzlens, it

follows that he had none with the bank. He is therefore a sham party, who instituted a fictitious action, for the alleged fraudulent purpose of enabling Fritzlen to litigate in the state court his causes of action against the bank set up in his answer and cross-petition, and to prevent the bank from removing such controversy to the federal court. In addition to all this, the pleadings disclose that Weldon's alleged note from the Fritzlens became due 10 days after it was made, that his mortgages were taken upon property already mortgaged for more than $32,000, and that only 11 days after the note became due, and 21 days after it was made, Weldon brought his sham action, making the bank a party defendant. The answer and cross-petition of D. G. Fritzlen and the reply of Weldon were filed on the same day, and concurrently alleged that the bank's note and mortgages were invalid, and, further, that it had no authority to enforce them in court. The bringing of an action by a plaintiff who has no actual controversy with the defendants, and for the purposes stated, operates as a legal fraud upon the federal court, as well as upon the party entitled to a removal. The institution of a fictitious action for the purpose of bringing two defendants of diverse citizenship, one being a non-resident, into a state court, to enable the resident defendant to litigate a cause of action against the non-resident defendant in the state court, and to prevent the non-resident defendant from removing the cause to the federal court, is as much a fraud upon the jurisdiction of the federal court and upon the non-resident defendant as is the fraudulent joining of a sham defendant. Under the authorities cited such sham party may be ignored and the right of removal determined between the actual parties to the real controversy.

The averments as to fraud, as well as all issues of fact raised by the petition for removal, are to be tried in the federal court alone. On a petition for removal the only question for a state court to decide is one of law, and that is whether, admitting the facts alleged in the petition and disclosed by the record to be true, the applicant has a right to a removal. *Railway Co.* v. *Stone*, 70 Kan. 708, 711, 79 Pac. 655; Removal Cases, 100 U. S. 457, 472, 25

L. Ed. 593; *Burlington, etc., Railway Co.* v. *Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159; *Railroad Co.* v. *Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963.

Was the second petition filed in time? It is contended that, as it was not filed at or before the time when the bank was required under the Code to answer Weldon's petition, it is too late. If the fraudulent conduct of Weldon and Fritzlen occasioned the delay of the bank in setting up their fraud as a ground for removal, they should not be allowed to take advantage of the delay and of their own wrong, and especially where the bank asked for removal as soon as their fraud was uncovered. In *Powers* v. *Chesapeake & Ohio Railway Co.* (C. C.) 65 Fed. 129, where the facts showed that a joinder and subsequent dismissal were a mere device of the plaintiff to defeat a removal by a non-resident defendant within the statutory time, it was held that he was estopped to assert the delay as an objection to a removal. Judge Taft said: "It has been several times decided by the Supreme Court that the time for removing the case fixed by the statute is not indispensable to the jurisdiction of the federal court, but that it may be waived by the consent and acquiescence of the parties, and that a party may be estopped by his conduct to allege it as an objection to removal." The Supreme Court of the United States, in *Ayres* v. *Watson*, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093, had before it the question whether a party might waive a delay or be estopped from objecting that the steps for removal had not been taken within the prescribed time, and it was held that diverse citizenship and some other grounds were jurisdictional and absolutely essential, but that the time of applying for a removal and the proffer of a bond were modal and formal and might be waived either expressly or by implication. In speaking of the time of application for a removal, Justice Bradley said: "It does not belong to the essence of the thing. It is not in its nature a jurisdictional matter, but a mere rule of limitation." And so the doctrine of estoppel was applied. The subject was again considered in *Northern Pacific Railroad* v. *Austin*, 135 U. S. 315, 10 Sup. Ct.

738, 34 L. Ed. 218, where the court remarked: "As the time within which a removal must be applied for is not jurisdictional, but modal and formal (*Ayres* v. *Watson*, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093), it may, though obligatory to a certain extent, be waived. And, as where a removal is effected the party who obtains it is estopped upon the question of the time, so if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to time could not be raised by him." The question came before the court in the later case of *Martin* v. *Baltimore & Ohio Railway Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311, and the court, in commenting on the decision in the Ayres Case, noted the fact that the estoppel was applied to the removing party, but decided that it was applicable to either party, and remarked that the decision in that case had never been doubted or qualified. In speaking of Justice Bradley's decision, it was said that: "His whole course of reasoning leads up to the conclusion that the time of removal, not being a jurisdictional and essential fact, is a subject of waiver and of estoppel alike." In *Connell* v. *Smiley*, 156 U. S. 335, 15 Sup. Ct. 353, 39 L. Ed. 443, Chief Justice Fuller said: "Whether the petition for removal was filed in time it is immaterial to consider, as neither Tenney nor Lay, who petitioned for removal, nor Connell, who consented as a party and participated as their attorney, can now raise the objection." In *Danvers Savings Bank* v. *Thompson*, 133 *Mass.* 182, a petition for removal was denied because one of the defendants was a citizen of the same state as the plaintiff. Later it was made to appear that this defendant had released all his interest in the subject-matter of the suit before the decision on the petition for removal had been made. This fact was not known at the time to the non-resident defendant, and, although known by the plaintiff, he did not disclose the fact. A rehearing of the petition for removal was asked for and obtained. The court said: "The defendant Thompson filed his petition for removal in due time. At the time it was filed he was entitled upon the real facts of the case to invoke the jurisdiction of the federal courts; he and the plaintiff being

citizens of different states. The concealment by the plaintiff of a vital fact ought not to prejudice the defendant. It was a fraud upon him and upon the court. We are of the opinion that upon the discovery of the real facts the defendant became entitled to a rehearing upon his petition for removal, and that the former rescript and order should be vacated and set aside." See, also, *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S., 92, 99, Sup. Ct. 264, 42 L. Ed. 673; *Church* v. *Church*, 80 N. Y. Supp, 770, 81 App. Div. 349.

If the estoppel were overlooked, the objection to removal should nevertheless be overruled. The failure to petition for removal at or before the time for answer does not necessarily preclude a removal. It is enough that it is asked for as early as the record in a case or the acts of the parties show it to be removable. A discovery that an honest mistake as to parties had been made, an increase in the demand for judgment, the dismissal of a defendant, or the amendment or filing of a pleading disclosing that the case is a removable one will justify an order of removal if upon the disclosure a party promptly files his petition. In *Powers* v. *Chesapeake & Ohio Railway*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, where a second petition for removal had been filed, it was said that the provision as to the time for filing a petition for removal could not be literally applied; that to do so would be inconsistent with the statute, and utterly to defeat all right of removal in many cases. It was said: "The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought." See, also, *Guarantee Co. of North Dakota* v. *Hanway*, 104 Fed. 369, 44 C. C. A. 312.

When the first petition for removal was filed, the fraudulent purpose and conspiracy of Weldon and Fritzlen to defeat the jurisdiction of the federal court and to prevent the litigation of the bank's controversy with Fritzlen in that court were not apparent. The only sources of information were the averments of Weldon's petition that the note sued on and to secure which the mortgages were given was payable within 10 days, and the fact that the action was instituted on the note and mortgages 11 days after they matured. These facts, taken in connection with others which occurred subsequently, point to the fraudulent purpose, but, standing alone, they were not sufficient to charge the bank with notice of the fraudulent scheme, nor to put it upon inquiry. The bank did not know from Weldon's petition what course the Fritzlens would pursue. It could not know that D. G. Fritzlen would practically admit Weldon's claim, nor that he would join him in asserting that its note and mortgages were void, nor yet that he would endeavor to litigate with the bank in that action any claim he had against it. If the bank had ventured to allege a fraudulent conspiracy to evade federal jurisdiction of a controversy between it and Fritzlen—a violent supposition, since there was then no such controversy—how could it have been proven? Fritzlen might have responded: "I have not questioned your note and mortgages, nor indicated a purpose to contest them with you in the Weldon or any other suit. Why should you impute fraud to me merely because Weldon holds or claims to hold past-due paper against me upon which he has brought suit?" And Weldon most assuredly would not have divulged the fraudulent purpose of his action. So at the time the bank filed its first petition for removal the record in the case did not show the case to be removable. But when Weldon's reply and the answer and cross-petition of D. G. Fritzlen were filed—both of which were filed on the same day and attacked the validity of the bank's note and mortgages on the same ground—the conspiracy and fraudulent purpose of Weldon and Fritzlen were uncovered, and the record revealed Weldon's action to be fictitious and without merit. Within a few days there-

after the bank filed its second petition for removal, upon the ground of diversity of citizenship, charging the fraud as disclosed by the record. As an excuse for not filing its second petition immediately, the bank states therein that it did not learn of the filing of these pleadings until June 4, 1904, nine days after they were filed, and further alleged that, "the defendant Boatmen's Bank further avers and states that the defendant Fritzlens herein were and have been in default from the time of the institution of this suit until the filing of said separate answer herein by and with the consent, connivance, and collusion of the plaintiff herein, and that by agreement between plaintiff and defendant Fritzlens the said separate answer of D. G. Fritzlen was withheld and not filed until after the remanding of this cause on the first petition filed by this petitioner so as to prevent it being made to appear while this action was pending on said former petition in the United States court that this suit was maintained for the fraudulent purposes aforesaid, and that the controversies herein were wholly between citizens of different states." It therefore clearly appears that the bank was diligent, and filed its second petition for removal as soon as the record showed the case to be a removable one.

But there is an additional reason why the second petition for removal should have been allowed, which is that it was filed within the time in which the bank was required to plead to Fritzlen's answer and cross-petition Admitting the allegations of the second petition for removal to be true, as we have assumed throughout, Weldon was not a real party in the action, and should be eliminated therefrom. The only real controversy, then, was between Fritzlen and the bank. Fritzlen's answer and cross-petition, the first pleading filed as between him and the bank, attacked the validity of the note and mortgages held by it and asked to have them adjudged void, and then set up the counterclaims upon which a judgment for money was asked. The bank took the negative side of these propositions. In considering an application for removal, the court may inquire into the nature of the controversy and the interests of the various parties, and arrange them on the record according to their interests

without regard to the positions assigned to them by the pleader. Removal Cases, *supra; Pacific Railway Co.* v. *Ketchum,* 101 U. S. 289, 298, 25 L. Ed. 932; *Evers* v. *Watson,* 156 U. S. 527, 532, 15 Sup. Ct. 430, 39 L. Ed. 520; *Dawson* v. *Columbia Trust Co.,* 197 U. S. 178, 25 Sup. Ct. 420, 49 L. Ed. 713; Black's Dillon on Removal of Causes, § 90. Within the rule stated, the Fritzlens should be treated as plaintiffs and the bank as a defendant. Treating Fritzlen's pleading, then, as an initial one, the bank's second petition for removal, having been filed before it was required to answer, was in time.

It follows that the ruling denying the second petition for removal and holding the case for trial was erroneous, and for that reason the judgment will be reversed. All the Justices concurring.

In the Supreme Court

OF THE UNITED STATES

D. G. FRITZLEN, *et al.*,
Plaintiffs in Error,
vs.
BOATMEN'S BANK,
Defendant in Error.
No. 345.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR IN OPPOSITION TO THE MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR HEREIN FOR WANT OF JURISDICTION.

On the part of the defendant in error it is contended, if we understand the contention, that the question presented by the motion to dismiss is that since the Supreme Court of Kansas sustained the right of removal of this case from the State to the Federal Court, that decision is not reviewable here, for the reason that no

title, right, privilege or immunity claimed under the laws of the United States was denied by the State Supreme Court. In other words the right, title and privilege of the Bank to remove the cause to the Federal Court has been confirmed and given effect by the highest Court of Kansas, and therefore no right of review by this Court is given by Section 709 of the Revised Statute. This contention our adversary supports by argument and citation of authority.

On the part of the plaintiffs in error, in opposition to the motion to dismiss, it is contended that the Federal question arising upon the record for the consideration of this Court is, whether the Supreme Court of Kansas gave due effect to a certain final order and judgment of the Circuit Court of the United States for the District of Kansas entered in April, 1904, remanding this cause to the State Court. That question is presented in the following case: In July, 1903, W. H. Weldon, one of the plaintiffs in error, commenced this case in the District Court of Clark County, Kansas. It was, under the Kansas practice, a civil action for the foreclosure of two mortgages executed by D. G. Fritzlen, covering certain real and personal property to secure the payment of his promissory note for Thirty-seven Hundred and Fifty Dollars ($3750.00).

In this action Fritzlen and the Boatmen's Bank, defendants in error, were made defendants. As to the Boatmen's Bank it was alleged in Weldon's petition that it claimed to have liens on the property covered by his mortgages, but that these liens were invalid and at all events were junior and inferior to his. In due time the Boatmen's Bank filed a petition for the removal of the case from the State Court, where it was pending, to the Circuit Court of the United States for the District of Kansas. After some litigation of the question of the right of the Bank to remove the case, in April, 1904, the Circuit Court of the United States for the District of Kansas, entered its judgment remanding this case to the District Court of Clark County, Kansas, for trial. After the return of the case to the State Court the Boatmen's Bank filed its answer setting up its liens and the debt for which they were alleged to be security, and claiming that the liens of the plaintiff Weldon was junior and inferior to those of the Bank, and denying generally all of the allegations of Weldon's petition. Afterwards Weldon filed his reply to the Bank's answer, reasserting the allegation of his petition and setting out facts which he claimed showed the liens disclosed by the Bank's answer to be illegal D. G. Fritzlen, one of the orig-

inal defendants below, and plaintiff in error here, after the Bank filed its answer in the State Court, filed an answer in which he made allegations similar to those made by Weldon concerning the illegality of the liens disclosed by the Bank's answer; and set out, in addition, facts which he claimed constituted cross-demands against the Bank connected with the cause of action set out in the Bank's answer. Within a short time after Weldon's reply and Fritzlen's answer were filed in this case in the State Court, the Bank filed a second petition for the removal of this case to the Circuit Court of the United States for the District of Kansas. This second petition for removal was denied by the State Court. No transcript of the record of this case has ever been filed by the Bank in the Circuit Court of the United States for the District of Kansas, nor has the Bank taken any other steps in the Federal Court to perfect any alleged right of removal under the second petition. This case proceeded to trial and judgment in the State Court, from which judgment all of the parties, both plaintiff and defendant, prosecuted proceedings in error to the Supreme Court of Kansas. The Bank proceeded by petition in error, accompanied by a record of the proceedings of the State Court, and

the plaintiff below, W. H. Weldon, and the defendant below, D. G. Fritzlen, filing cross petitions in error in accordance with the practice of the Supreme Court of Kansas.

In the Supreme Court of Kansas it was contended on the part of the Bank that the District Court of Clark County had no jurisdiction of the case after the filing by the Bank of its second petition for removal. On the part of both Weldon and Fritzlen it was specially set up and contended in the Supreme Court of Kansas in opposition to the contention of the Boatmen's Bank, that under the provisions of Section 6, of the Act of Congress of March 3, 1887, the judgment of the Circuit Court of the United States remanding this case to the State Court was a final and conclusive adjudication against the right of the Boatmen's Bank to remove the cause, and that there was nothing in the second petition for removal filed by the Boatmen's Bank, after the judgment of remand, to impair the full force and effect of the judgment remanding the cause, entered by the Circuit Court of the United States for the District of Kansas.

The Supreme Court of Kansas, by its judgment and decision, determined that the District Court of Clark County erred in denying the second petition for re-

moval filed by the Boatmen's Bank, and that such petition was sufficient to oust the jurisdiction of the State Court and, therefore, reversed the case, with directions to sustain the second petition for removal. Thereupon W. H. Weldon, the plaintiff below, and Fritzlen, one of the defendants below, both of whom are similarly affected by this decision and judgment of the State Supreme Court, have duly removed this case to this Court for the purpose of reviewing this decision and judgment of the Supreme Court of Kansas.

ARGUMENT.

We respectfully insist that the jurisdiction of this Court is almost too clear to require argument. In the case of *Nutt vs. Knut*, 200 U. S., 12-19, this Court, speaking through MR. JUSTICE HARLAN, said:

"A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of Section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved. We perceive no sufficient reason to modify the views expressed in these cases as to our jurisdiction. It is true there are some cases, which, it is contended, justify a contrary view. We will not now stop to examine these cases narrowly and to declare wherein they may be in conflict with the cases above cited. Suffice it to say, that upon a careful re-consideration of the whole subject, and after reviewing all the cases bearing upon the

precise question of jurisdiction now before us, we re-affirm the views expressed in the above cited cases, as demanded by the statutes regulating the jurisdiction of this court."

This conclusion is re-affirmed by this Court in the case of *Illinois Central Railroad vs. McKendree*, 203 U. S., 514-525. See also *Rector vs. City Deposit Bank*, 200 U. S., 405-412.

In *McCormick vs. Market Bank*, 165 U. S., 538, the case of *Strader vs. Baldwin*, 9 How., 261, which is much relied upon by the defendant in error in this case, is referred to; MR. JUSTICE GRAY, speaking for this Court, said (Page 546):

"In *Strader vs. Baldwin*, indeed, under the like provisions of a former bankrupt act, where a bankrupt, being sued upon a debt, pleaded his discharge, and the plaintiff replied that the debt was contracted while acting in a fiduciary capacity, and the decision of the state court was in favor of the defendant, this court held that it had no jurisdiction, because the decision below was in favor of the right set up by the defendant. But the court there failed to notice that the decision, while in favor of the right or immunity, set up by the defendant, of a discharge under the Bankrupt Act, was also against the right or immunity, set

up by the plaintiff, under the clause excepting fiduciary debts from the effect of that discharge. And the case has accordingly been overruled in similar cases arising under the recent bankrupt act, in which this court has taken jurisdiction, not only when the writ of error was sued out by the defendant, but also when it was sued out by the plaintiff, because, as was said by Chief Justice Waite in delivering judgment in the latest case upon this point, the plaintiff 'specially set up and claimed an immunity, under Sec. 5117 of the Revised Statutes, from the operation of the discharge in bankruptcy, because of the fraudulent and fiduciary character of his debt, and the decision was against him'."

This language well expresses the conclusive reason why the contention of our adversary should not be sustained. While it is entirely clear that the decision of the Supreme Court of Kansas is in favor of the right or privilege set up by the Boatmen's Bank, namely the right to remove this case to the Circuit Court of the United States, that decision is also against the right set up by the plaintiffs in error springing from the final judgment of the Circuit Court of the United States for the District of Kansas, remanding this case to the District Court of Clark County.

This is not a case like *Giles vs. Little*, 134 U. S., 645,

referred to by defendant in error, where the question was whether the *opinion* of this Court in another case should be followed by the State Court, but there is presented by this record precisely the situation considered by MR. JUSTICE GRAY in *Giles vs. Little*, when he said:

"If the State Court had refused to give due effect to a final judgment of any court of the United States in a case between the same parties, a Federal question would have been presented which might have been brought to this court for review."

In *Pittsburg, etc., Railway vs. Loan & Trust Co.*, 172 U. S., 493, where it was contended that the record presented no Federal question which this Court would review, MR. JUSTICE HARLAN answered the contention by referring to the repeated decisions of this Court that, where the State Court refuses to give effect to the judgment of a Court of the United States, a question is undoubtedly raised, which, under the provisions of Section 709, may be brought to this Court for revision. And after pointing out that the same effect should be given to a judgment of the Federal, as to the judgment of a State Court, said (page 509):

"If such effect is not conceded to it but is refused, then due validity and effect are not given to it, and a

case is made for the interposition of the power of reversal conferred upon this court. We are bound to inquire, therefore, whether the judgment of the Circuit Court thus brought in question would have had the effect of binding and concluding Rochereau if it had been rendered in a state court."

And so in the case at bar: It having been contended in the Supreme Court of Kansas by the plaintiffs in error here, that the effect of the judgment of the Circuit Court of the United States remanding this case was to finally adjudicate between the parties that this case was not removable, this Court is bound to inquire into the decision of the Kansas Supreme Court holding that the judgment remanding the cause was not final and conclusive in the circumstances presented by the record; and, if this Court shall reach the conclusion that such judgment of the Circuit Court of the United States did have the effect contended for by the plaintiffs in error, it should exercise the power of reversal conferred upon it by Section 709.

For the present we will not consider the merits of the contention of the plaintiffs in error, that due effect was not given to a judgment in their favor, of the Circuit Court of the United States, by the Supreme Court of Kansas, but nevertheless we think it proper

to go sufficiently into the question so that the Court will see that it is of serious moment.

Section 6, of the Act of March 3, 1887, provides:

"Whenever any cause shall be removed from any state court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court, so remanded such case, shall be allowed."

This section was much considered by this Court in the case of *Missouri Pacific Railway Company vs. Fitzgerald*, 160 U. S., 556. In that case an effort was made to have this Court review an order made by the Circuit Court remanding a cause to the State Court. This Court reached the conclusion that the language of the section just quoted disclosed an intention on the part of Congress to make the judgment of the Circuit Court remanding causes to State Courts, final and conclusive, and that no power was given to any court to review such judgments, either by writ of error, appeal, mandamus or otherwise. Considerable emphasis was placed by this Court upon the words found in the Sec-

tion, "such remand shall be immediately carried into execution," for the purpose of showing the manifest intention of Congress that there should be no further litigation of the question of jurisdiction determined by the judgment remanding the cause. That case also presented the question whether a second motion to remand should be considered by the Circuit Courts, when a previous motion attacking the jurisdiction had been overruled, and it was decided that it was the duty of the Circuit Courts to consider such second motion, to the end that the intention of Congress to restrict the jurisdiction of the Circuit Courts might be fully carried out.

In the case at bar, notwithstanding the plain language of Section 6 of the Act of 1887, requiring that the judgment remanding a cause shall be immediately carried into execution and denying to the defeated party any review of such judgment, our adversary seems to contend that by filing a second petition for removal in the State Court, he may renew the litigation of the jurisdictional question and thereby prevent the judgment remanding the cause being immediately carried into execution.

True, counsel for the defendant in error will insist that this record discloses facts and circumstances

which did not condition the case at the time the judgment remanding it to the State Court was entered. When this contention is examined, it is found to rest upon the action of a co-defendant in the case, who, by his answer, set up cross demands against the Boatmen's Bank. It will be found that the case as made by the plaintiff Weldon at the time of the commencement of the litigation in the State Court, is the precise case in which the judgment remanding the cause was entered, and in which the second petition for removal was filed. The original petition, filed by Mr. Weldon in the District Court of Clark County, is the identical pleading upon which the cause was tried and upon which the judgment was rendered. Furthermore it will be found that before any answer or cross demand, or other pleading of any kind or description was filed in this case, the Boatmen's Bank filed an answer, in which it set up the amount, nature and priority of its liens, and that until this pleading was filed by the Bank there was no other pleading filed by either the plaintiff Weldon or the defendant Fritzlen.

We submit that it will be too apparent to require argument that the answer filed in the case by the Bank, after the judgment remanding the cause had been entered, not only invited the pleadings which were sub-

sequently filed by Weldon and by Fritzlen, but made the filing of such pleadings indispensable for the protection of the rights of these parties in the property, which was the subject matter of the suit. So that this contention of our adversary presents this question: Where a Circuit Court of the United States renders a final judgment remanding a case to the State Court, and the defendant who sought the removal of such case files an answer in the State Court, inviting and making necessary the assertion by his co-defendant of matters of defense to the allegations of such answer, can the defendant, who sought the removal, avoid the effect of the judgment remanding the cause by filing a second petition for removal, predicated upon the answer of his co-defendant responsive to the pleading filed by him? We submit that it is the settled law relating to the removal of causes from a State to a Federal Court, that the determination of the question of removability turns upon the case made by the plaintiff in his petition filed in the State Court; that separate controversies between co-defendants cognizable in the cause, cannot make a case removable unless the allegations of the plaintiff's petition confer jurisdiction upon a Circuit Court of the United States; that separate defenses do not make separable controversies and that the existence

of cross demands between co-defendants is wholly immaterial to the question whether or not the case as made by the plaintiff is removable.

But it is said by our adversary that, in his second petition for removal it is alleged that the suit was designed for the fraudulent purpose of preventing a removal of the cause by the Boatmen's Bank. An examination of the second petition for removal will disclose no allegation of the discovery of any fraud, subsequent to the time the Boatman's Bank filed its first petition to remove. Therefore, the defendant in error finds itself in the strange position of one who seeks to avoid the effect of a former adjudication by pleading thereto facts which, if they had been litigated in the former case, might have changed the result; which could have been litigated in the former case, and no excuse is shown for the failure to litigate them. In other words, notwithstanding the finality of the judgment of the Circuit Court remanding this cause to the State Court, it is now seriously contended by our adversary that that judgment is wholly ineffectual by reason of the fraudulent joinder of defendants without his showing any reason or excuse why this fact, which is now deemed so important, was not presented to the Circuit Court of the United States prior to the rendition of its judgment.

We forbear to go further into the question which was before the Kansas Supreme Court as to the effect which should be given to the judgment remanding this case to the State Court, because we think it must be apparent that enough is shown from which this Court may conclude that there is a Federal question in the case, which the plaintiffs in error have a right to have reviewed here.

We think it proper to call the attention of this Court to the fact that the right claimed by these plaintiffs in error, under the judgment rendered by the Circuit Court of the United States in April, 1904, under Section 6, of the Act of 1887, was conceded by the trial court and therefore in the cross petition in error, filed by these plaintiffs in error, there was no reason for them to specially set it up. But in the briefs filed in the Supreme Court, as well as in the arguments made to that Court, the right of these plaintiffs in error to insist upon the mandatory provisions of Section 6, of the Act of 1887, and upon the estoppel created by the judgment of the Circuit Court remanding the case, were repeatedly urged upon the consideration of the Court, and the decision and judgment of the Kansas Supreme Court cannot be sustained without denying the claim of these plaintiffs in error of a

right conferred by the provisions of Section 6, of the Act of 1887, and by the judgment of the Circuit Court of the United States remanding this cause to the State Court.

H. J. BONE,

D. R. HITE,

F. C. PRICE,

Attorneys for Plaintiffs in Error.

October, 1907.

Oct. 23/07

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 99.

D. G. FRITZLEN *et al.*,
Plaintiffs in Error,

vs.

BOATMENS BANK,
Defendant in Error.

Memorandum Answering Suggestion that Record be Printed on Motion to Dismiss.

JAMES S. BOTSFORD,
For Defendant in Error.

B. H. TYRRELL, PRINTER, 203-205 FULTON STREET, NEW YORK.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 345.

D. G. FRITZLEN *et al.*,
Pltffs. in Error,

vs.

BOATMENS BANK,
Defdt. in Error.

Mem. answering suggestion that record be printed on motion to dismiss.

At the time of the submission of the motions to this court to dismiss or to advance the cause for an early hearing, counsel appeared and orally opposed consideration of the motion to dismiss because the record has not been printed. No such point is made in the brief filed by counsel in opposition to the motion to dismiss and no hint is contained therein that the facts related in the motion to dismiss are not true or that they are insufficient to entitle the motion to consideration. However the decision of the Kansas Supreme

Court in question, which is a part of the record herein, is printed with the motion to dismiss, and that opinion is sufficient to enable this Court to act on that motion. In addition to that opinion is that of the Circuit Court of Appeals (130 Fed., 650), and that of this Court (198 U. S., 586), both parts of this litigation. The Kansas Supreme Court opinion is also published in 89 Pac. Rep., 915. This Court has more than once decided that the record need not be printed on motions like this (Walston *v.* Nevin, 128 U. S., 579; Cattle Co. *v.* Scott, 137 U. S., 436; Carey *v.* R. W. Co., 150 U. S., 179).

It is suggested at page 4 of counsel's brief that no transcript of the record herein was filed in the Federal Court. In this counsel again errs. That transcript was so filed immediately after the decision of the Kansas Supreme Court. The filing of the transcript in the Federal Court at that time was sufficient (R. W. Co. *v.* Kountz, 104 U. S., p. 5). Besides this point if containing any merit should have been presented to the Kansas Supreme Court, whose decision is final.

Respectfully submitted,

JAMES S. BOTSFORD,
for Defendant in Error.

Office Supreme Court, U. S.
FILED.
JUN 27 1907
JAMES H. McKENNEY,
Clerk

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

D. G. FRITZLEN, ET AL., *Plaintiffs in Error,*
vs.
BOATMENS BANK, *Defendant in Error.*
} No. 99.

Error to the Supreme Court of Kansas.

Motion to Advance Cause for an Early Hearing.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Boatmens Bank, Defendant in Error.

JAMES S. BOTSFORD,
Of Counsel.

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1907.

D. G. FRITZLEN, ET AL., *Plaintiffs in Error,*
vs.
BOATMENS BANK, *Defendant in Error.*
} No. 345.

Error to the Supreme Court of Kansas.

MOTION TO ADVANCE CAUSE FOR AN EARLY HEARING.

And now at this day again comes the said defendant in error, the Boatmens Bank, and in the event that the motion submitted herewith to dismiss the writ of error herein for want of jurisdiction, shall either be denied or held up for decision until the final hearing herein, moves the court to advance this cause for an early hearing at such time as may be fixed by this court in its order for that purpose.

Said defendant in error says that since August, 1903, and for more than four years prior to the submission of these motions, said Fritzlens have been contesting the right of said Boatmens Bank to recover on

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Said defendant in error says that since August, 1903, and for more than four years prior to the submission of these motions, said Fritzlens have been contesting the right of said Boatmens Bank to recover on

its note and mortgage for $32,920.15, by interposing and contesting the right of said Boatmens Bank to remove this case to the United States Circuit Court for the District of Kansas; that all of said time has been consumed in contesting the question of jurisdiction herein, as will appear from the decisions of the Circuit Courts of Appeals of the Eighth Circuit and the Supreme Court of Kansas, in the cases of *Boatmens Bank* v. *Fritzlen,* 135 Fed., 650; 68 C. C. A., 288, and *Boatmens Bank* v. *Fritzlen,* 89 Pac. Rep., 915.

Said defendant in error further submits that the question of jurisdiction in this case was settled, so far as this court is concerned, by its refusal of the petition for *certiorari* in the case of *Fritzlen* v. *Boatmens Bank,* reported in Vol. 198 U. S. Rep., 586, 587, and that in view of the decision of this court in the refusal of said petition for *certiorari,* this writ of error is sued out for vexation and delay.

Wherefore, in the event of the denial of the motion filed herewith to dismiss the writ of error for want of jurisdiction, or in the event that said court shall hold up said motion for consideration until the hearing of this cause on the merits, said defendant in error, Boatmens Bank, moves the court to advance this cause on the docket for early hearing, at such time as this court may determine in its order for that purpose.

JAMES S. BOTSFORD,
BUCKNER F. DEATHERAGE,
ODUS G. YOUNG,
Attorneys for Boatmens Bank,
Defendant in Error.

JAMES S. BOTSFORD,
Of Counsel.

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FRITZLEN *v.* BOATMEN'S BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 99. Argued January 28, 29, 1909.—Decided February 23, 1909.

If, after an order to remand has been made, it results, from the subsequent pleadings or conduct of the parties, that the cause is removable, a second application to remove can be made, and the right to make it is not controlled by the previous remanding order; nor is the granting of the order to remove under such circumstances a refusal to give effect to such previous order to remand.

In this case, *held* that in an action to foreclose, where the junior encumbrancer as plaintiff joined the senior encumbrancer as a defendant and attacked the validity of his lien, as did the owner of the property, also a defendant, a separable controversy existed between the senior encumbrancer on the one side and the owner and the junior encumbrancer on the other side, which was removable, as diverse citizenship existed when the parties were so arranged; and such removal could not be prevented either by the unnecessary joinder of the senior encumbrancer, or because prior to the filing of the reply showing the separable nature of the controversy a remanding order had been made.

Powers v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, followed as to when an application for removal is made in time.

75 Kansas, 479, affirmed.

THE facts are stated in the opinion.

Mr. D. R. Hite, with whom *Mr. H. J. Bone* and *Mr. F. C. Price* were on the brief, for plaintiffs in error.

Mr. James S. Botsford, with whom *Mr. Buckner F. Deatherage* and *Mr. Odus G. Young* were on the brief, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

On the twenty-third of July, 1903, in a court of the State of Kansas, William H. Weldon, a citizen of that State, sued

D. G. Fritzlen and his wife Edna, also such citizens, and the Boatmen's Bank, a corporation organized under the laws and a citizen of Missouri. The cause of action against the Fritzlens was a note for $3,750, dated July 2, 1903, maturing in ten days, alleged to be secured by mortgages covering described real estate and certain live stock. The bank was made a defendant upon the averment that it claimed to have a mortgage on the real estate and personal property which secured the note sued on, and this alleged mortgage was asserted to be illegal and void, and, in any event, to be "junior and subordinate to the right, title, interest and lien of this plaintiff." Judgment for the amount of the note with interest was prayed, as also that the mortgage securing the same be decreed to be a first and prior lien over all others on the property; that so much of the property as was necessary be sold to satisfy the judgment; and that "the pretended claim, lien and interest of the said defendant, the Boatmen's Bank, be declared to be illegal and void." Summons by publication was made, calling upon the bank to answer before September 4, 1903. On July 30 Weldon applied for a temporary injunction, preventing the defendants, pending the suit, from removing any of the property beyond the jurisdiction of the court, and a restraining order was allowed. On August 13, 1903, the bank demurred to the petition, because facts adequate to establish that the mortgage by it held was invalid were not averred, and because two distinct causes of action were unlawfully joined, the one to enforce the alleged mortgage against the Fritzlens and the other assailing the rights of the bank. On the day the demurrer was filed the bank, giving the necessary bond, asked removal of the cause to the Circuit Court of the United States for the District of Kansas, on the ground that the controversy as to the validity of its mortgage was separable from the controversy concerning the enforcement of the alleged mortgage against the Fritzlens, and additionally because of local prejudice. On September 14 the Circuit Court of the United States, presided over by Lochren, J., overruled motions to remand made

by Fritzlen and Weldon, the court basing its action upon the separable nature of the controversies and not considering the ground of local prejudice, and on that day the court dissolved the restraining order previously allowed by the state court. A copy of the order refusing to remand was filed in the state court. On the ninth of October, 1903, in the United States District Court for the District of Kansas, the bank brought an action of replevin for the possession of the personal property embraced in its mortgage, and the marshal, under a writ of replevin, took and delivered the property to the bank. More than six months after the order refusing to remand the Circuit Court of the United States for the District of Kansas, presided over by Pollock, J., granted a motion of Weldon to remand the cause to the state court. In making this order the court considered that the prior refusal to remand was not binding upon it, because it deemed the question of jurisdiction to be always open, and it was its plain duty to decline to take jurisdiction over a cause if the power to entertain it did not obtain. 128 Fed. Rep. 608.

Thereupon the bank in the state court, on May 14, 1904, withdrew its demurrer and answered. Besides denying the averments of Weldon's petition, it was alleged that the bank was the holder for value of a note of Fritzlen for $32,920.15, dated November 30, 1901, and secured by mortgage on the personal and real property referred to in the petition of Weldon, the mortgage having been recorded on December 6, 1901. It was averred that the lien of the bank was paramount to any lien resulting from the Weldon mortgage. The prayer was only this: "Wherefore, having fully answered, said Boatmen's Bank prays judgment and that it may go hence without day," and with costs in its favor. About ten days after, the Fritzlens applied to the state court for an order directing the bank to restore to them the personal property taken under the writ of replevin. The motion stated the prior issue of a restraining order; recited the facts as to the refusal to remand by Lochren, J., the bringing of the replevin suit, and the subsequent

remanding of the cause under the order of Pollock, J. It was recited that the replevin suit had been dismissed for want of jurisdiction by the Circuit Court of the United States. Upon this motion, on the same day, the court directed the return of the property, or if sold, the deposit of the proceeds in a designated bank. As the effect of this order and the subsequent procedure concerning it is not relevant to the question which we are called upon to decide, it is not necessary to further refer in detail to the subject. Suffice it to say that the bank thereafter moved to set aside the order on the ground, among others, that the restraining order had been set aside by the Circuit Court of the United States while the case was there pending, and that although the replevin suit had been dismissed for want of jurisdiction the question of the rightfulness of the dismissal was pending before the Circuit Court of Appeals for the Eighth Circuit.

On the twenty-sixth day of May, 1904, Fritzlen answered the petition of Weldon, by admitting the debt and mortgage, but charging that all the interest claimed was not due. The answer then proceeded to set out matters which were alleged to be Fritzlen's "cause of action against his co-defendant, the Boatmen's Bank." The matters alleged on this subject were substantially as follows:

First. It was charged that the note which was held by the Boatmen's Bank embraced the sum of previous note or notes given by Fritzlen to the firm of Elmore & Cooper, and an association known as the Elmore & Cooper Live Stock Commission Company, a Missouri corporation. These previous notes, it was charged, were secured by a chattel mortgage, but were not negotiable, and had been assigned to the Boatmen's Bank, and were subject to any equity existing in favor of Fritzlen. The notes, it was alleged, were made up in considerable part of charges or commissions which had been exacted by Elmore & Cooper or the commission company for commissions relating to the sale and handling of live stock for Fritzlen at the Kansas City stock yards. These commissions, it was alleged, had been

exacted because of an illegal combination in restraint of trade, in violation of the laws of the State of Kansas controlling the method of doing business at the Kansas City stock yards, to which Elmore & Cooper and the commission company were parties, and hence Fritzlen was entitled to recover the sum thereof. The amount of the commissions thus referred to exceeded three thousand dollars.

Second. That prior to the time when the bank had acquired the note or notes from Elmore & Cooper or the commission company, and subsequent thereto up to the time when the bank obtained the note described in its answer, it was a Missouri corporation, and had not complied with the laws of Kansas authorizing foreign corporations to do business in that State. It was charged that the dealings concerning the assignment of the notes from Elmore & Cooper and the commission company, as well as the dealings which led up to the giving of the note upon which the bank relied, as well as other transactions, constituted a doing of business in Kansas by the bank in violation of law, and therefore the note was void.

Third. That prior to the giving of the note which the bank held, negotiations had supervened between the bank and Fritzlen, having reference to the liability of the latter for the note or notes which the bank had acquired from Elmore & Cooper and the commission company. That as a result of these negotiations it had been contracted between the bank and Fritzlen that the bank would make to Fritzlen additional advances of money to enable him to carry on the business of his stock farm in Kansas, and would furnish to Fritzlen the food required to feed his stock on his ranch during the winter of 1902–1903, and that as a result of these understandings it was agreed between them that Fritzlen give a new note to the bank for the amount of its previous claims and advances, which should be secured by a chattel mortgage as well as one upon real estate, and that the note held by the bank was given as the result of this agreement. It was then charged that although the bank had repeatedly been called upon to comply

with its contract to furnish the food for the cattle, it had failed to do so, and as a result of a sudden and rigorous blizzard in the winter of 1903 over five hundred head of the cattle perished by starvation and the remainder were reduced in value, resulting in a loss of at least twenty thousand dollars. The sum of this loss was asserted to be due by the bank to Fritzlen.

Fourth. Further, it was charged that although after the bringing of the suit by Weldon a restraining order had been by him obtained forbidding the removal of the cattle which were covered by the chattel mortgage, the bank had illegally taken possession of and removed cattle to the value of twenty-five thousand dollars, and was liable to Fritzlen to return the same or to pay their value. The answer concluded by a prayer that an account be taken by the court of the debt due by Fritzlen to the plaintiff Weldon, so as to fix the sum of the interest due thereon; that the note held by the bank and the chattel mortgage securing the same be decreed to be null and void; that an account be stated between the bank and Fritzlen without reference to the amount of the note held by the bank, so as to exclude illegal charges previously made by Elmore & Cooper and the commission company, and that the bank, in the accounting, be charged with the loss occasioned by the death or injury of cattle caused by its failure to supply food under its contract. It was additionally prayed that it be decreed that the real estate mortgage held by the bank had been completely paid, and consequently that all liens arising therefrom be decreed to be extinguished, and unless the bank returned the cattle illegally taken there also be a recovery for the full value thereof.

On the same day—May the 26th—Weldon, the plaintiff, filed his reply to the answer of the Boatmen's Bank. By such answer Weldon, in effect, set up as against the bank the same causes of action advanced by Fritzlen in his answer concerning the illegality of the note held by the bank, because it had engaged in business as a foreign corporation in the State of Kansas without complying with the state law, and because

there had entered into the sum of the note held by the bank illegal charges previously made by Elmore & Cooper and the Elmore & Cooper Commission Company.

On June 10, 1904, the bank made its second application to remove the case, based upon the ground that the effect of the replies of Fritzlen and of Weldon was to make manifest that there was a separable controversy as to the validity of the mortgage of the bank, between Weldon and Fritzlen on the one side and the bank on the other, which was cognizable in the United States court, and moreover that it plainly resulted from the pleadings, since the entry of the order to remand made by Pollock, J., that Weldon had unnecessarily made the bank a party to his suit to foreclose against Fritzlen as the result of a conspiracy between Fritzlen and himself, for the purpose of preventing the issue as to the validity of the mortgage of the bank being tried in the courts of the United States. It was recited that the answers of Fritzlen and Weldon had been filed without notice, and the motion to remand was made at once on learning of such filing.

The court, although it found that the bond for removal was sufficient, declined to order the removal, to which the bank excepted. It is unnecessary to detail the further proceedings in the trial court. It is adequate to say that the issues between the parties were tried in part by a jury and in part by the court, and resulted in a judgment allowing in part the claim of Fritzlen against the bank, and the remainder of the claim of the bank against Fritzlen, and while giving a judgment in favor of Weldon against Fritzlen rejected the claim of Weldon as to the entire illegality of the mortgage to the bank.

The case was removed to the Supreme Court of Kansas by proceedings in error prosecuted by the various parties. Pending its determination—taking judicial notice of our own records—it is to be observed that the cause was decided which was pending in the Circuit Court of Appeals for the Eighth Circuit, resulting from the writ of error prosecuted from that court to the judgment of the Circuit Court for the District of Kansas,

dismissing for want of jurisdiction the replevin action referred to in the previous statement. The court, while treating the order for remanding the cause made by Pollock, J., as not subject to be reviewed, nevertheless held that the effect of that order was not necessarily controlling as to the jurisdiction of the court below in the replevin action brought whilst the Weldon suit was pending in the Circuit Court of the United States in consequence of the refusal of Lochren, J., to remand. Coming to consider, as an independent question, whether the subject matter of the replevin suit was beyond the jurisdiction of the Circuit Court for the District of Kansas, it was held that the suit was clearly within the jurisdiction of the court, because the Weldon suit presented a separable controversy between Weldon and Fritzlen on the one side and the bank on the other, as to the validity of the mortgage of the bank, and that although the remanding order of Pollock, J., could not be reversed, nevertheless its effect, while operative and not open to attack, did not necessarily oust the Circuit Court of jurisdiction over the replevin action brought when the Weldon suit was pending in the Circuit Court. The judgment dismissing the replevin suit for want of jurisdiction was reversed and the case remanded for further proceedings. 135 Fed. Rep. 650. A petition praying a writ of certiorari to review this judgment was by this court denied. 198 U. S. 586.

The case pending on error in the Supreme Court of Kansas was thereafter decided. That court, without questioning the order remanding the cause made by Pollock, J., as controlling in the condition of the pleadings at the time that order was made, held that by the effect of the pleadings filed after the return of the cause in consequence of the order remanding the record presented a separable controversy, with Weldon and Fritzlen on the one side and the bank on the other, which justified the second application to remove, and therefore that application had been wrongfully refused. It in addition held that the evolution of the pleadings in the state court after the order to remand was adequate to establish *prima facie* that

Weldon, in suing to enforce his mortgage, had joined the bank, although it was not a necessary party to that proceeding, because of a collusive conspiracy between himself and Fritzlen to enable the latter to contest with the bank the validity of its mortgage and prevent that controversy from being cognizable in the Federal courts, which would have been otherwise the case. 75 Kansas, 479. This writ of error was then prosecuted.

A motion to dismiss was postponed to the hearing on the merits. The assertion that we have power to review is based upon the proposition that the necessary effect of the judgment of the court below was to refuse to give effect to the order of the Federal court remanding the cause, which it is insisted was final and the law of the case in all subsequent proceedings, and not susceptible of being reviewed in any forum, citing *Fitzgerald* v. *Missouri Pacific R. R.*, 160 U. S. 556. But it is not open to controversy that if after an order to remand has been made it results, from the subsequent pleadings or conduct of the parties to the cause, that the cause is removable, on the development of such situation a second application to remove may be made, and the right to do so because of the changed aspect is not controlled by the previous order remanding the cause. *Powers* v. *Chesapeake & Ohio Ry.*, 169 U. S. 92. See also *Wecker* v. *National Enameling Co.*, 204 U. S. 176. It follows, therefore, that the contention that the necessary effect of the judgment below was to refuse to give effect to the previous remanding order is without foundation. It is said, however, that as the power to entertain a subsequent motion to remove depended upon a change in the condition of the record, that the result of the judgment below was to deny all effect to the prior order remanding the cause, as there had been no such change in the record as to justify the granting of the second order to remove. To sustain this proposition it is insisted that substantially the only change that resulted from the pleadings filed after the remanding of the cause was that brought about by the filing of the answer of Fritzlen and the defenses set up in that answer against the mortgage held by the bank, which, it is argued in

the nature of things could not operate to affect the removability of the suit between Weldon and Fritzlen. But the premise upon which the proposition rests is without foundation in fact. As we have seen, the petition of Weldon impleading Fritzlen and the bank, while it assailed the bank's mortgage in express terms, alleged that that mortgage, if it existed, was junior in rank to the mortgage of Weldon. And the serious consequences which that averment had upon the order to remand the case is indicated in the opinion of Pollock, J., sustaining the motion to remand. The necessary effect of the answer of the bank, filed after the remanding, and of the answer by Fritzlen, as well as of the answer filed by Weldon, expressly joining Fritzlen in his attack upon the mortgage of the bank, was to make clear the untruth of the averment of the junior character of the mortgage held by the bank and to establish, therefore, the fact that the bank was not an indispensable or necessary party to the suit of Weldon for the foreclosure of the mortgage against Fritzlen.

It follows therefore that the contention that the state of the record at the time the second application for removal was made was not materially different from the condition existing when the prior order to remand was allowed, is unwarranted. So far as the separable nature of the controversy is concerned, arising on the record as it existed at the time the second application to remove was made, we might rest content with saying that we think the removal was rightly allowed, for the reasons stated in the opinion of the court below and in that of the Circuit Court of Appeals for the Eighth Circuit in *Boatmen's Bank* v. *Fritzlen*, *supra*, and the authorities there cited. We observe, however, that under the case made, as the bank was not an indispensable party to the suit of Weldon to foreclose, the mere fact that the bank was by him joined as a defendant along with Fritzlen cannot be held to operate to prevent the application of the rule of separable controversy, and that from its application we think it quite clear that the validity of the bank's mortgage, assailed as it was under the cir-

cumstances of the case, was a separable controversy with Weldon and Fritzlen on one side and the bank on the other, and it was therefore rightly the subject of removal. Without stopping to give the reason for our conclusion, we also think it is quite clear, within the ruling in *Powers* v. *Chesapeake & O. Ry. Co.*, *supra*, that the second application to remove was made in time.

While the views just expressed might justify granting the motion to dismiss, yet in consequence of the character of the question (*Swafford* v. *Templeton*, 185 U. S. 487), instead of dismissing, our decree will be,

Affirmed.